

No. 16385 ✓

United States
Court of Appeals
for the Ninth Circuit

ELSINORE C. MACHRIS GILLILAND, also
known as Elsinore Machris Gilliland,
Appellant,

vs.

FAYE LYONS, Appellee.

Transcript of Record

Appeal from the United States District Court for the
Southern District of California,
Central Division

FILED

JUN 18 1959

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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* Page numbers appearing at bottom of page of Original Transcript of Record.

United States District Court, Southern District
of California, Central Division

No. 20301 PH

FAYE LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

COMPLAINT

(Libel—Invasion of Privacy—Slander)

Comes now the plaintiff and for her cause of ac-
tion alleges the following:

I.

Jurisdiction exists in the above entitled Court by reason that plaintiff is a citizen of the State of Florida, County of Dade, and defendant is a citizen of the State of California, County of Riverside. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That the defendant, on or about the 1st day of October, 1955, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the

plaintiff the false and malicious words following, to-wit:

“That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his [2] residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as “Ray Gilliland and Family.”

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and

by reason thereof, plaintiff demands exemplary and and punitive damages against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Second Cause of Action

Comes now the plaintiff and complains and alleges as follows for her second cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein in full, Paragraph I of her first cause of action herein. [3]

II.

That, on or about the 26th day of November, 1955, at the City of Los Angeles, County of Los Angeles, State of California, the defendant Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, well knowing the premises, in a certain discourse in the presence and hearing of diverse persons, maliciously spoke, wrote and verified and published of and concerning the plaintiff the false and malicious words following, to-wit:

“That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilli-

land and said Faye Lyons were registered by him as 'Ray Gilliland and Family.'"

That said writing was incorporated in a cross complaint for divorce entitled George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, vs. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, First Doe to Sixth Doe, inclusive, Defendants; Elsinore Machris Gilliland, also known as Elsinore C. Machris Gilliland, Cross-Complainant, vs. George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Cross-Defendant, and Faye Lyons and Ann Meyers, Jane Doe and Mary Roe, Co-Respondents, which has been filed in the Superior Court of the State of California in and for the County of Riverside, No. 62839. That said complaint was verified by the Cross-Complainant, Elsinore Machris Gilliland on the 26th day of November, 1955, in the State of California, County of Los Angeles. [4]

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff is greatly injured

in her name and reputation and has been rendered liable to prosecution for adultery to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Third Cause of Action

Comes now the plaintiff and complains and alleges as follows for her third cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein in full, Paragraphs I, II and III of her first cause of action and Paragraphs I, II and III of her second cause of action.

II.

That said allegations were published in a newspaper of general circulation, as well as spoken and plead by the defendant. That defendant was never served in said divorce proceeding nor given an opportunity to defend her good name in the matter. [5] That said publication has caused plaintiff great mental pain, humiliation and mortification and has

tended to expose her to public contempt, ridicule, aversion and disgrace, and has caused an evil opinion of her in the minds of her acquaintances and the public generally, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

III.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of the plaintiff and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Hundred Thousand Dollars (\$500,000.00) as compensatory damage, and for the sum of Five Hundred Thousand Dollars (\$500,000.00) as exemplary and punitive damages, for costs of suit, and for such other and further relief as to the Court may deem just and equitable in the premises.

/s/ FAYE LYONS. [6]

Duly Verified.

[Endorsed]: Filed August 9, 1956.

[Title of District Court and Cause.]

AMENDED COMPLAINT

(Libel—Invasion of Privacy—Slander)

Comes now the plaintiff and for her cause of action alleges the following:

I.

Jurisdiction exists in the above entitled Court by reason that plaintiff is a citizen of the State of Florida, County of Dade, and defendant is a citizen of the State of California, County of Riverside. The matter in controversy exceeds, exclusive of interest and costs, the sum of Three Thousand Dollars (\$3,000.00).

II.

That the defendant, on or about the 29th day of March, 1955, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray is shacking up with Faye Lyons." That the defendant, on or about the 10th day of August, 1955, at Palm Springs, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and [8] published of the plaintiff the false and malicious words following, to-wit: "Ray is shacking up with Faye Lyons." That the defendant, on or about the 26th day of November, 1955, at

Los Angeles, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as "Ray Gilliland and Family." That the defendant, on or about the 21st day of December, 1955, at Riverside, California, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray is being punished for sleeping with Faye Lyons." That the defendant, on or about the 14th day of February, 1956, at Scottsdale, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray shackled up with Faye Lyons." That the defendant, on or about the 15th day of May, 1956, at Scottsdale, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious

words following, to-wit: "Ray shackled up with Faye Lyons." That the defendant, on or about the 26th day of March, 1956, at Phoenix, Arizona, in a certain discourse which the defendant had in the presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: "Ray shackled up with Faye Lyons." [9]

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton

disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For a Second Cause of Action

Comes now the plaintiff and complains and alleges as follows for her second cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein in full, Paragraphs I, II, III, IV and V of her first cause of action [10] herein.

II.

That, on or about the 26th day of November, 1955, at the City of Los Angeles, County of Los Angeles, State of California, the defendant Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, well knowing the premises, in a certain discourse in the presence and hearing of diverse persons, maliciously spoke, wrote and verified and published of and concerning the plaintiff the false and malicious words following, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did

commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as "Ray Gilliland and Family." That plaintiff herein was never served in said divorce proceeding nor did defendant endeavor to serve said plaintiff nor was plaintiff given an opportunity to defend her good name in the matter nor assuage her feelings by being given the opportunity to defend as required by the Statutes of the State of California.

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the [11] public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

For A Third Cause of Action

Comes Now the plaintiff and complains and alleges as follows for her third cause of action herein.

I.

Incorporates herein by reference as completely as though set forth herein full, Paragraphs I, II, III, IV and V of her first cause of action and Paragraphs I, II, III, IV and V of her second cause of action.

II.

That defendant, Elsinore C. Machris Gilliland, sought newspaper publicity, gave interviews to the press, endeavored to have her story written in the magazine known as Confidential for, as she often said, "Her public must be informed." That by reason of her endeavors, there was published in a newspaper of general circulation on or about March 23, 1956, as well as spoken and plead by the defendant, the following, to-wit:

"In her counter complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two

socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix. [12]

Named as co-respondents in the counter complaint were "Ann (Peggy) Meyers" and "Faye Lyons."

In an affidavit, Mrs. Gilliland stated she had an annual income of \$267,000 in 1954 and requires at least \$10,000 a month subsistence."

III.

That the defendant meant by the foregoing false and malicious words that the plaintiff was unchaste; that she lived in concubinage and was guilty of a felony under, and by virtue of, the laws of the State of Arizona by reason that the plaintiff had been guilty of the crime of adultery.

IV.

That by means of the publishing of said false and malicious words, the plaintiff has been caused great mental pain, distress, humiliation, and mortification, and has been exposed to public contempt, ridicule, aversion and disgrace and has caused an evil opinion of her in the minds of her acquaintances and the public generally, the plaintiff is greatly injured in her name and reputation and has been rendered liable to prosecution for adultery, all to her damage in the sum of Five Hundred Thousand Dollars (\$500,000.00).

V.

That in doing the things herein alleged, the defendant acted maliciously, was guilty of a wanton disregard of the rights and feelings of plaintiff, and by reason thereof, plaintiff demands exemplary and punitive damage against the said defendant in the sum of Five Hundred Thousand Dollars (\$500,000.00).

Wherefore, plaintiff prays judgment against the defendant for the sum of Five Hundred Thousand Dollars (\$500,000.00), as compensatory damage, and for the sum of Five Hundred Thousand Dollars (\$500,000.00) as exemplary and punitive damages, for costs of suit, and for such other and further relief as to the Court may [13] deem just and equitable in the premises.

/s/ COIT I. HUGHES,
Attorney for Plaintiff. [14]

Affidavit of Service by Mail Attached. [15]

[Endorsed]: Filed November 20, 1956.

[Title of District Court and Cause.]

NOTICE OF MOTION TO STRIKE FROM
AMENDED COMPLAINT; AND POINTS
AND AUTHORITIES

To Coit I. Hughes, Esq., 208 West 8th Street, Los
Angeles, California, Attorney for Plaintiff:
Please Take Notice that the undersigned will

move this Court at Courtroom No. 1, United States Courts and Post Office Building, City of Los Angeles, State of California, on the 10th day of December, 1956, at 10:00 o'clock A.M. of said day, or as soon thereafter as counsel can be heard, to strike from the Amended Complaint the hereinafter described allegations, on the ground that said allegations are redundant and immaterial under Rule 12 (f) Federal Rules of Civil Procedure.

Specification 1. To strike from Paragraph II of the First Cause of Action the following allegation on page 1, lines 25-29:

"That the defendant, on or about the 29th day of March, 1955, in a certain discourse which the defendant had in the [16] presence and hearing of diverse persons, maliciously spoke and published of the plaintiff the false and malicious words following, to-wit: 'Ray is shacking up with Faye Lyons.' "

The ground for said motion on Specification 1 is that the alleged defamatory statement is immaterial in that the claim based thereon did not accrue within one year before the commencement of this action, and is therefore barred by the provisions of Section 340 subd. (3) of the California Code of Civil Procedure, and Section 12-541 subd. (1) of Arizona Revised Statutes Annotated.

That it would be unduly burdensome on defendant to investigate said alleged occurrence and prepare a defense thereto when no relief would be granted on said alleged defamatory statement, since

any such relief is barred by any applicable statute of limitations.

Specification 2. To strike from Paragraph II of the Third Cause of Action the following allegation on page 6, lines 3-5:

“In an affidavit, Mrs. Gilliland stated that she had an annual income of \$267,000 in 1954 and requires at least \$10,000 a month subsistence.”

The ground for said motion on Specification 2 is that the alleged statement is not, as a matter of law, libelous, is completely immaterial and if not stricken might be prejudicial to defendant.

This motion is based on all the pleadings and papers on file in the above entitled action, answers to the written interrogatories requested by defendant under Rule 33 of Federal Rules of Civil Procedure, and the points and authorities attached hereto.

Dated: November 30, 1956.

WM. L. MURPHEY and
JOHN B. ANSON,

/s/ By JOHN B. ANSON,
Attorneys for Defendant. [17]

Memorandum of Points and Authorities

I.

Upon a motion made by a party within 20 days after the service of the pleading upon him, the court may order stricken from any pleading any redundant or immaterial matter.

Rule 12 (f) Federal Rules of Civil Procedure.

II.

Regarding Specification 1 hereof, it appears on the face of the complaint that the alleged defamatory statement is barred by the statute of limitations.

The defense of limitations can be raised by motion to dismiss.

Berry v. Chrysler Corp. (C.C.A. Mich., 1945) 150 F (2) 1002;

Stanley v. Bird (D.C. Ky. 1949) 85 F. Supp. 358;

Under Rule 9 (b) Federal Rules of Civil Procedure, for the purpose of testing the sufficiency of a pleading, averments of time are material, and where the complaint shows on its face that the action is barred by the statute of limitations, the defense can be raised on a motion to dismiss.

Gossard v. Gossard (C.C.A. Colo. 1945) 179 F (2d) 111.

However, in the instant case, the allegation sought to be stricken under Specification 1 constitutes only one out of seven alleged defamatory statements, constituting the First Cause of Action, and hence a motion to strike said allegations as redundant and immaterial under Rule 12 (f) seems more appropriate than a motion to dismiss under Rule 12 (b) (6).

III.

The allegations sought to be stricken under Specification 2 are completely irrelevant to the alleged

Third Cause of Action, and also immaterial, and have no bearing upon the controversy.

Such allegations are properly subject to a motion to [18] strike from the pleadings.

Salem Engineering Co. v. National Supply Co. (D.C.) Pa. 1948) 75 F. Supp. 993.

Respectfully submitted,

WM. L. MURPHEY and

JOHN B. ANSON,

/s/ By JOHN B. ANSON,

Attorneys for Defendant. [19]

Affidavit of Service by Mail Attached. [20]

[Endorsed]: Filed November 30, 1956.

[Title of District Court and Cause.]

MINUTES OF THE COURT

Date: Dec. 10, 1956. At: Los Angeles, Calif.

Present: Hon. Wm. C. Mathes, District Judge.

Calling Calendar of Hon. Peirson M. Hall, District Judge.

Deputy Clerk: S. W. Stacey. Reporter: Don P. Cram.

Counsel for Plaintiff: Coit I. Hughes.

Counsel for Defendant: John B. Anson.

Proceedings: For hearing on (1) motion of defendant to dismiss the amended complaint, and (2) motion of defendant to strike from the amended complaint.

Oral stipulation nunc pro tunc as of Nov. 20, 1956, re amended complaint is approved and Court Orders motion (1) denied, counsel for plaintiff to prepare formal order; and motion (2) granted, counsel for defendant to prepare formal order.

JOHN A. CHILDRESS,

Clerk,

/s/ By S. W. STACEY,

Deputy Clerk. [21]

[Title of District Court and Cause.]

ANSWER TO AMENDED COMPLAINT

For answer to plaintiff's Amended Complaint, defendant admits, denies, and alleges as follows:

As To The First Cause of Action

I.

For answer to the allegations in Paragraph I of plaintiff's First Cause of Action, defendant admits that she is a citizen of the State of California, County of Riverside. Defendant alleges that she has no knowledge or information sufficient to form a belief as to the balance of the allegations in said Paragraph I, and basing her denial on said lack of information or belief, denies each and every other allegation contained in said Paragraph I.

II.

For answer to the allegations in Paragraphs II and III of the First Cause of Action, defendant de-

nies each and every [22] allegation, statement, and averment in said paragraphs contained.

III.

For answer to the allegations in Paragraph IV of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's First Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

IV.

For answer to the allegations in Paragraph V of the First Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that she did the things alleged in the First Cause of Action or any of them, and specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00 or in any sum whatsoever or at all.

V.

First Affirmative Defense to the First Cause of Action

Defendant is informed and believes and upon such information and belief alleges that each and all of the supposed defamatory words set forth in the First Cause of Action in plaintiff's Amended Complaint are true.

As to the Second Cause of Action

I.

For answer to the allegations in Paragraph I of plaintiff's Second Cause of Action, defendant re-adopts and reasserts the allegations and denials hereinabove set forth in Paragraphs I, II, III, and IV of her Answer to the First Cause of Action herein.

II.

For answer to the allegations in Paragraph II of plaintiff's Second Cause of Action, defendant admits and alleges that [23] on or about November 26, 1955, there was pending in the Superior Court of the State of California, in and for the County of Riverside, an action for divorce against defendant on a complaint for divorce filed on or about October 21, 1955, being action No. 62839 on the register of actions in the office of the Clerk of said court entitled: "George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, vs. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, First Doe to Sixth Doe inclusive, Defendants."

That defendant's attorneys prepared a cross-complaint for divorce in said divorce action No. 62839 on defendant's behalf in which plaintiff herein, Faye Lyons, and one Ann Meyers were named as Co-Respondents in the Second Cause of Action in said cross-complaint for divorce. That the Second Cause of Action in said cross-complaint for divorce in said divorce action No. 62839 contained the following allegation:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him **over-**night, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as ‘Ray Gilliland and Family.’”

That on or about November 28, 1955, defendant verified said cross-complaint, and on or about November 28, 1955, said cross-complaint was filed in said divorce action No. 62839 by her attorneys.

Further answering the allegations of Paragraph II of the Second Cause of Action defendant admits that plaintiff herein was not served in said divorce action No. 62839. Defendant alleges [24] that defendant did endeavor to serve plaintiff herein in said divorce action No. 62839. Defendant is informed and believes and upon such information and belief alleges that defendant’s attorneys diligently endeavored to ascertain plaintiff’s address and place of residence, but were unable, after due diligence, to locate or ascertain the place of residence of plaintiff in order to serve her; defendant alleges that plaintiff has, since shortly after November 29, 1955, had full knowledge of the pendency of said Second Cause of Action of said cross-complaint in divorce action No. 62839, and has not made any appearance

therein, although plaintiff has had full and complete opportunity to do so.

Defendant alleges that the parties to said divorce action No. 62839, on or about June 12, 1956, entered into a property settlement agreement, mutually satisfactory to both parties, in which defendant's then husband, George Chester Gilliland, agreed to dismiss with prejudice his complaint for divorce and any affirmative relief sought in his answer to the cross-complaint filed in said action No. 62839; that the plaintiff in said action No. 62839 stipulated in writing that the first cause of action of said cross-complaint based upon extreme cruelty be heard as a default, and on June 13th, 1956, said divorce action was so tried on the issues of the first cause of action of the cross-complaint, and an interlocutory decree of divorce was granted to defendant herein and was entered on June 13, 1956, in Judgment Book 76 Page 630, of the Superior Court of the State of California, in and for the County of Riverside. Defendant alleges that said Second Cause of Action in said divorce action No. 62839 has not been dismissed and is still pending.

Defendant denies each and every other allegation in said Paragraph II of plaintiff's Second Cause of Action not hereinabove expressly admitted and alleged. [25]

III.

For answer to the allegations in Paragraph III of plaintiff's Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained.

IV.

For answer to the allegations in Paragraph IV of the Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's Second Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

V.

For answer to the allegations in Paragraph V of the Second Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00 or in any sum whatsoever or at all.

VI.

First Affirmative Defense to the Second
Cause of Action

That the substance of the supposed defamatory words set forth in the Second Cause of Action herein were incorporated as allegations in a cross-complaint for divorce filed in said action No. 62839 on the register of actions in the Superior Court of the State of California, in and for the County of Riverside, in exact words as follows:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit

adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did [26] associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.' "

That said allegation is a privileged publication under the provisions of section 47 subd. 2 (3) of the Civil Code of the State of California, in the following facts which defendant hereby alleges:

1. That said cross-complaint for divorce was verified by defendant;

2. That the allegations of the supposed defamatory words in said cross-complaint for divorce were made by defendant in good faith and without malice;

3. That at the time the allegations of the supposed defamatory words in said cross-complaint for divorce were made, defendant had good and sufficient reason to believe and did honestly and reasonably believe that said allegations were true, and defendant had reasonable and probable cause for believing the truth of said allegations;

4. That the allegations of the supposed defamatory words in said cross-complaint for divorce were material and relevant to the issues in said action No. 62839;

5. That defendant did not in any other way publish the supposed defamatory words alleged in the Second Cause of Action of the Amended Complaint herein.

VII.

Third Affirmative Defense to the Second Cause of Action

That the Second Cause of Action fails to state a claim against the defendant upon which relief can be granted.

As to the Third Cause of Action

I.

For answer to the allegations of Paragraph II of [27] plaintiff's Third Cause of Action, defendant admits and alleges that on March 23, 1956, there was published in the Daily Enterprise, a newspaper of general circulation in Riverside, California, a news article describing a hearing on March 22, 1956, in the Superior Court of the State of California, in and for the County of Riverside, the hereinbefore described action No. 62839, and that said article contained, among other statements, substantially the words set forth in quotations in Paragraph II of plaintiff's Third Cause of Action herein.

Except as hereinabove expressly admitted and alleged, defendant denies each and every other allegation in said Paragraph II of plaintiff's Third Cause of Action, and specifically denies that defendant had anything at all to do with said newspaper publication, and specifically denies that said news-

paper publication was "by reason of her endeavors," in any manner whatsoever.

III.

For answer to the allegations in Paragraph III of plaintiff's Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained.

IV.

For answer to the allegations in Paragraph IV of the Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further defendant specifically denies that by reason of the matters alleged in plaintiff's Third Cause of Action, or for any reason or at all, defendant was damaged in the sum of \$500,000.00, or in any other sum whatsoever or at all.

V.

For answer to the allegations in Paragraph V of the Third Cause of Action, defendant denies each and every allegation, statement, and averment in said paragraph contained, and further [28] defendant specifically denies that she did the things alleged in the Third Cause of Action or any of them, and specifically denies that plaintiff is entitled to exemplary and punitive damages in the sum of \$500,000.00, or in any sum whatsoever or at all.

VI.

First Affirmative Defense to Third
Cause of Action

Defendant is informed and believes and upon such information and belief alleges that the supposed defamatory words set forth in plaintiff's Third Cause of Action are true.

VII.

Second Affirmative Defense to Third
Cause of Action

That the substance of the supposed defamatory words set forth in the Third Cause of Action were incorporated as allegations in the Second Cause of Action of a cross-complaint for divorce filed in said action No. 62839, on the register of actions in the Superior Court of the State of California, in and for the County of Riverside, in exact words as follows:

“That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as ‘Ray Gilliland and Family.’”

That said allegation is a privileged publication under the provisions of section 47 subd. 2 (3) of the Civil Code of the State of California, in the following facts which defendant hereby alleges:

1. That said cross-complaint for divorce was verified by defendant;

2. That the allegations of the supposed defamatory words [29] in said cross-complaint for divorce were made by defendant in good faith and without malice;

3. That at the time the allegations of the supposed defamatory words in said cross-complaint for divorce were made the defendant had good and sufficient reason to believe and did honestly and reasonably believe that said allegations were true, and defendant had reasonable and probable cause for believing the truth of said allegations;

4. That the allegations of the supposed defamatory words in said cross-complaint for divorce were material and relevant to the issues in said action No. 62839;

5. That defendant did not in any other way publish the said supposed defamatory words.

VIII.

Third Affirmative Defense to Third Cause of Action

That the Third Cause of Action fails to state a claim against the defendant upon which relief can be granted.

Wherefore, defendant prays that plaintiff take nothing by her action, and that defendant have judgment against plaintiff for her costs of suit, and for such other and further relief as to the court may seem just.

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Attorneys for Defendant. [30]

Duly Verified.

Affidavit of Service by Mail Attached. [31]

[Endorsed]: Filed December 28, 1956.

PLAINTIFF'S EXHIBIT No. 2

[Title of District Court and Cause.]

PRE-TRIAL CONFERENCE ORDER

Following pre-trial, proceedings pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 9 of this Court, It Is Ordered:

I.

This is an action for damages for slander and libel.

A. Plaintiff's Complaint.

By the first cause of action of her complaint, Faye Lyons, as plaintiff, seeks to recover from Elsinore C. Machris Gilliland, also known as Elsinore Mach-

Plaintiff's Exhibit No. 2—(Continued)

ris Gilliland, as defendant, compensatory damages in the sum of \$500,000.00 and exemplary damages in the sum of \$500,000.00 for alleged oral defamations claimed to have been made by defendant concerning the plaintiff:

1. On August 10, 1955, at Palm Springs, California, to-wit: "Ray is shacking up with Faye Lyons". [32]

2. On November 26, 1955, at Los Angeles, California, to-wit: "That, in May and June, 1955, Ray Gilliland associated with, kept, and did commit adultery with one Faye Lyons, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, Ray Gilliland did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where Ray Gilliland and said Faye Lyons were registered by him as 'Ray Gilliland and Family'."

3. On December 21, 1955, at Riverside, California, to-wit: "Ray is being punished for sleeping with Faye Lyons".

4. On February 14, 1956, at Scottsdale, Arizona, to-wit: "Ray shacked up with Faye Lyons".

5. On May 15, 1956, at Scottsdale, Arizona, to-wit: "Ray shacked up with Faye Lyons".

6. On March 26, 1956, at Phoenix, Arizona, to-wit: "Ray shacked up with Faye Lyons".

In Paragraph III plaintiff alleges and claims that defendant meant, by said statements, that plain-

Plaintiff's Exhibit No. 2—(Continued)

tiff was unchaste; that she lived in concubinage, and was guilty of a felony by reason of adultery as set out in Arizona Revised Statutes 13-221.

By the second cause of action of her complaint, said plaintiff alleges and claims that defendant falsely and maliciously filed a verified cross-complaint in the Superior Court of Riverside County, State of California, in that certain action entitled "George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Plaintiff, v. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, et al., Defendants, and Elsinore Machris Gilliland, also known as Elsinore C. Machris Gilliland, Cross-complainant, v. George Chester Ray Gilliland, also known as G. Ray Gilliland, also known as Ray Gilliland, Cross-Defendant, and Faye Lyons and Ann Meyers, Jane Doe and Mary Roe, Co-Respondents," being No. 62839 upon the register of [33] actions of the Clerk of said Court, in which it was alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family'."

Plaintiff's Exhibit No. 2—(Continued)

In Paragraph III plaintiff alleges and claims that defendant meant, by said statements, that plaintiff was unchaste; that she lived in concubinage, and was guilty of a felony by reason of adultery as set out in Arizona Revised Statutes 13-221.

Plaintiff claims compensatory damages in the sum of \$500,000.00 and exemplary damages in the sum of \$500,000.00.

By her third cause of action of her complaint, said plaintiff alleges and claims that defendant sought newspaper publicity, gave interviews to the press in an endeavor to have her story written in a magazine known as "Confidential", and that she often said "her public must be informed"; that by the defendant's endeavors there was published in the *Riverside Enterprise*, a newspaper of general circulation, on March 23, 1956, an article as follows, to-wit: "In her complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix. Named as co-respondents in the counter complaint were 'Ann (Peggy) Meyers' and 'Faye Lyons'."

In Paragraph III plaintiff alleges and claims that defendant meant, by said statements, that plaintiff was unchaste; that she lived in concubinage, and was guilty of a felony by reason of adultery as set out in Arizona Revised Statutes 13-221. [34]

Plaintiff's Exhibit No. 2—(Continued)

Plaintiff claims to have been damaged thereby in the sum of \$500,000.00 compensatory damages and \$500,000.00 exemplary damages.

A-(1) Plaintiff has stated no separate cause of action for invasion of privacy and claims all of the statements alleged in the complaint are false and untrue, but plaintiff nevertheless claims a right to recover under the doctrine of invasion of privacy on each and every count. The decision on that matter is reserved to time of trial.

B. Answer of Defendant.

By her answer to each of the causes of action defendant denies each and all of the allegations of said Paragraphs III; denies that she made any of the defamatory statements alleged in said first cause of action; denies that the plaintiff was damaged thereby in the sum of \$500,000.00 as compensatory damages or in the [35] sum of \$500,000.00 as exemplary damages or any other sum or amount.

As a first affirmative defense to said first cause of action, defendant alleges that the supposed defamatory statements set forth in said cause of action are true.

By her answer to the second cause of action, the defendant admits that she verified a cross-complaint for divorce in said action No. 62839, which she caused to be filed on or about November 28, 1955; that in her second cause of action of said cross-complaint, it was alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and

Plaintiff's Exhibit No. 2—(Continued)

did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.'” Denies that plaintiff has been damaged in the sum of \$500,-000.00 or any sum or at all.

As a first affirmative defense to said second cause of action, defendant alleges that the filing of the said cross-complaint containing said allegation is a privileged publication under the provisions of Sec. 47, subdiv. 2(3) of the Civil Code of the State of California, by reason of the following facts, alleged:

1. Said cross-complaint for divorce was verified by defendant.

2. Said allegations were made by the defendant in good faith and without malice.

3. At the time said allegations were allegedly made, defendant had good and sufficient reason to believe, and did honestly and reasonably believe, that said allegations were true, and defendant had reason and probable cause for believing the truth [36] of said allegations.

4. Said allegations were material and relevant to the issues of said action No. 62839.

5. Defendant did not in any other way publish

Plaintiff's Exhibit No. 2—(Continued)

the supposed defamatory words alleged in the said second cause of action.

As a second affirmative defense to said second cause of action, defendant alleges that said second cause of action fails to state a claim against defendant upon which relief can be granted.

By her answer to the third cause of action, the defendant denies that she sought newspaper publicity, gave interviews to the press, endeavored to have her story written in a magazine known as "Confidential," or that she often said, or at all, "her public must be informed"; admits that on March 23, 1956, there was published in the Riverside Daily Enterprise, a newspaper article in substantially the same words as are alleged in plaintiff's third cause of action; denies that she interviewed representatives of said newspaper or caused said article to be published; and denies that plaintiff was damaged by the publication of said newspaper article in the sum of \$500,000.00 as compensatory damages or in the sum of \$500,000.00 as exemplary damages or any other sum or amount.

As a first affirmative defense to the third cause of action, defendant alleges that the supposed defamatory statements are true.

As a second affirmative defense to said third cause of action, defendant alleges that, in so far as the allegations of the cross-complaint in action No. 62839 are incorporated in the said third cause of action, the said allegations are a privileged publica-

Plaintiff's Exhibit No. 2—(Continued)

tion under the provisions of Sec. 47, subdiv. 2 (3) of the Civil Code of the State of California, by reason of the facts stated in connection with the first affirmative defense to the second cause of action, namely:

1. Said cross-complaint for divorce was verified [37] by defendant.

2. Said allegations were made by the defendant in good faith and without malice.

3. At the time said allegations were allegedly made, defendant had good and sufficient reason to believe, and did honestly and reasonably believe, that said allegations were true, and defendant had reason and probable cause for believing the truth of said allegations.

4. Said allegations were material and relevant to the issues of said action No. 62839.

5. Defendant did not in any other way publish the supposed defamatory words alleged in the said second cause of action.

As a third affirmative defense to said third cause of action, defendant alleges and claims that said third cause of action fails to state a claim against defendant upon which relief can be granted.

II.

Federal jurisdiction is invoked upon the ground that the plaintiff is a citizen of the State of Florida and the defendant is a citizen of the State of California; that the matter in controversy exceeds the sum of \$3,000.00, exclusive of interest and costs.

Plaintiff's Exhibit No. 2—(Continued)

III.

The following facts are admitted and require no proof:

A. Plaintiff was, at the time of filing the amended complaint herein, a citizen of the State of Florida and the defendant was a citizen of the State of California, and the matter in controversy exceeded the sum of \$3,000.00, exclusive of interest and costs.

B. By her verified cross-complaint filed in said action No. 62839, in the Superior Court of Riverside County, California, the defendant alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one [38] Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.'"

C. In said action No. 62839, in the Superior Court of Riverside County, California, Ray Gilliland, as plaintiff, sued Elsinore Machris Gilliland, as defendant, for divorce. By her cross-complaint therein, she sought a divorce against said Ray Gilliland on the grounds of extreme mental cruelty and adultery. The allegations of said cross-com-

Plaintiff's Exhibit No. 2—(Continued)

plaint, complained of by plaintiff here, were material to the issues in said action.

IV.

The following facts, though not admitted, are not to be contested at the trial by evidence to the contrary: None.

V.

The following issues of fact, and no others, remain to be litigated upon the trial:

A. First Cause of Action:

1. Did the defendant, on August 10, 1955, at Palm Springs, California, in the presence of Earl Thomas or L. W. Anderson, state "Ray is shacking up with Faye Lyons."

2. Did the defendant, on December 21, 1955, at Riverside, California, in the presence of Ray Gilliland, Ida Barr or Phil Barnett, state "Ray is being punished for sleeping with Faye Lyons."

3. Did the defendant, on February 14, 1956, at Scottsdale, Arizona, in the presence of Mr. Turbeville, Mr. Carpenter or Mr. Phil Kent, state "Ray shacked up with Faye Lyons."

4. Did the defendant, on May 15, 1956, at Scottsdale, [39] Arizona, in the presence of Ida Barr, Paul Hayden, Frank Kerwin, Rita Kerwin or Patti Karger, state "Ray shacked up with Faye Lyons."

5. Did the defendant, on March 26, 1956, at

Plaintiff's Exhibit No. 2—(Continued)

Phoenix, Arizona, in the presence of Ida Barr, state "Ray shackled up with Faye Lyons."

6. If said statements were made, were they true.
7. If said statements were made, were they made with actual malice, or malice in fact.
8. If said statements were made, was the plaintiff damaged thereby and the extent of such damage.

B. Second Cause of Action:

1. Were the allegations of the cross-complaint, filed by the defendant in said action No. 62839, in the Superior Court of Riverside County, California, privileged under the Provisions of Sec. 47, subdiv. 2(3) of the Civil Code of the State of California, which involves the following issues of fact:

(a) Were the said allegations, made by the defendant, made in good faith and without malice.

(b) At the time said allegations were made, did the defendant have good and sufficient reason to believe, and honestly and reasonably believe, that said allegations were true, and did defendant have reasonable probable cause for believing the truth of said allegations.

(c) Did the defendant publish said alleged libelous statement other than by filing the cross-complaint in said divorce action.

2. If the said allegations of said cross-complaint in said action No. 62839 were not privileged, was the plaintiff damaged thereby and the extent of such damage.

Plaintiff's Exhibit No. 2—(Continued)

C. Third Cause of Action:

1. Was the article published in the *Riverside Daily Enterprise* on November 23, 1956, published by the endeavors of [40] defendant, or did she cause said publication to be made.

2. If the plaintiff establishes by the evidence that the defendant caused said article to be published in the *Riverside Daily Enterprise* on March 23, 1956, or that it was published by her endeavors, then the corollary issue of fact will be: Did the defendant seek publicity, give interviews to the press, endeavor to have written in a magazine known as "Confidential" a story in substance and effect the same as was published in the *Riverside Daily Enterprise* on March 23, 1956, as an element of malice. Otherwise, the said issue will not be involved.

3. Was the article published in the *Riverside Daily Enterprise* on March 23, 1956 true.

4. If said publication was a result of defendant's endeavors, or she caused same, did she act with malice.

5. If said publication was a result of defendant's endeavors, or she caused same, was the plaintiff damaged thereby and the extent of such damage.

VII.

The exhibits to be offered at the trial, together with a statement of all admissions by and all issues between the parties with respect thereto, are as follows:

Plaintiff's Exhibit No. 2—(Continued)

A. The plaintiff will offer in evidence the following documents:

1. A photostatic copy of the hospital and medical records of the Visalia Municipal Hospital, Visalia, California, from December 31, 1950 to January 27, 1951, for Ray C. Gilliland, also known as George Chester Ray Gilliland, also known as G. Ray Gilliland, attached to the deposition of Mary Elizabeth Bailey, filed with the Court in the above-entitled action on February 10, 1958.

2. First page of the Daily Enterprise newspaper for Friday, March 23, 1956, published at Riverside, California. [41]

3. Letter from Lindsey Hopkins Vocational School, Miami, Florida, certifying that Mrs. Faye Lyons attended the Hotel Front Office Cashiering class at the Lindsey Hopkins Hotel School from August 29, 1955, through October 23, 1955, without absence.

B. The defendant will offer in evidence the following documents:

1. A photostatic copy of the registration #2822 at the Colonial House, Las Vegas, Nevada, showing that Ray Gilliland registered himself and two other guests on 9-28-55 and departed on 9-29-55, in the following manner: "Ray Gilliland and Family, Gilliland, Texas"; also statement of the Colonial House, Las Vegas, Nevada, showing the charges to Ray Gilliland and Family therefor.

2. Verified statement of Blanche Lampert made

Plaintiff's Exhibit No. 2—(Continued)

at Scottsdale, Arizona, on November 2, 1955, in the presence of Elsinore Machris Gilliland and Wm. L. Murphey, and Velma Shanks, Court Reporter, a true copy of which is attached to the deposition of Wm. L. Murphey, filed with the Court in the above-entitled action on March 28, 1958. Defendant will contend that the exhibits listed as "1" and "2" directly above are material to the issue of privilege in making the allegations of defendant's cross-complaint in said action No. 62839.

3. Photostatic copies of Receipt #6258 dated June 14, 1955, issued by Ray Silverman, co-owner of the Paradise Valley Guest Ranch at Scottsdale, Arizona, to Mrs. F. Lyons. Also receipts #6364 and 6377, issued by Ray Silverman, co-owner of the Paradise Valley Guest Ranch, at Scottsdale, Arizona, to Mrs. F. Lyons. These receipts are attached as Exhibits 1, 2 and 3 to the deposition of Mr. Ray Silverman, filed with the Court in the above-entitled action on January 9, 1958. Said receipts will show that Faye Lyons occupied apartment One from June 14, 1955 to July 7, 1955 at the Paradise Valley Guest Ranch. [42]

VIII.

The following issues of law, and no others, remain to be litigated upon the trial:

A. Were the statements alleged to have been made by the defendant in the first cause of action of the amended complaint herein slanderous, per se.

B. Were the allegations of the cross-complaint

Plaintiff's Exhibit No. 2—(Continued)

filed by the defendant in said action No. 62839, in the Superior Court of Riverside County, California, privileged.

C. Is the defendant liable for the publication of the article in the Riverside Daily Enterprise on March 23, 1956, if the defendant did not endeavor to procure publication thereof or cause publication thereof.

IX.

The foregoing admissions have been made by the parties, and the parties having specified the foregoing issues of fact and law remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial of this cause, unless modified to prevent manifest injustice.

Dated: May 12, 1958.

/s/ PEIRSON M. HALL,
United States District Judge.

Approved as to form and content:

/s/ COIT I. HUGHES,
Attorney for Plaintiff,

/s/ WM. L. MURPHEY,
Attorney for Defendant. [43]

Affidavit of Service by Mail Attached. [45]

[Endorsed]: Filed May 12, 1958.

United States District Court, Southern District
of California, Central Division

No. 20301 WM

FAYE LYONS, Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT

The above-entitled cause came on regularly for trial on June 3, 1958, in Department Two of the above-entitled court, William C. Mathes, Judge Presiding, the plaintiff, Faye Lyons, appearing by Coit I. Hughes, her attorney, and the defendant, Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, appearing by her attorneys, Wm. L. Murphey and John B. Anson, and evidence both oral and documentary having been offered and received on June 3, 4, and 5, 1958, and said cause having been argued and submitted on June 5, 1958, and the court having duly considered the evidence and being fully advised in the premises, makes the following:

Findings of Fact

I.

As to all causes of action: [47]

It is true that plaintiff was, at the time of filing the amended complaint herein, a citizen of the

State of Florida and the defendant was a citizen of the State of California, and the matter in controversy exceeded the sum of \$3,000.00, exclusive of interest and costs.

II.

As to the First Cause of Action:

(a) It is not true that the defendant, on August 10, 1955, at Palm Springs, California, in the presence of Earl Thomas or L. W. Anderson, stated "Ray is shacking up with Faye Lyons."

(b) It is not true that the defendant, on December 21, 1955, at Riverside, California, in the presence of Ray Gilliland, Ida Barr or Phil Barnett, stated "Ray is being punished for sleeping with Faye Lyons."

(c) It is not true that the defendant, on February 14, 1956, at Scottsdale, Arizona, in the presence of Mr. Turbeville, Mr. Carpenter or Mr. Phil Kent, stated "Ray shacked up with Faye Lyons."

(d) It is not true that the defendant, on May 15, 1956, or at any other date, at Phoenix, Arizona, or at any other place, in the presence of Ida Barr, Paul Hayden, Frank Kerwin, Rita Kerwin, Judge Samuel Blake, or Mrs. Samuel Blake, or any other persons, stated "Ray Gilliland had shacked up with Faye Lyons," or any other words of similar substance or import.

(e) It is not true that the defendant, on March 26, 1956, at Phoenix, Arizona, in the presence of Ida Barr, stated "Ray shacked up with Faye Lyons."

(f) It is not true that the defendant did, at any

time or place, state to any person in substance or effect that "Ray shackled up with Faye Lyons."

(g) It is not true that the defendant, at the times and places, and before the persons specified in plaintiff's amended [48] complaint on file herein, or as specified in the pre-trial conference order, Plaintiff's Exhibit 3 in evidence herein, or at any other time or place, or before any person or persons, state maliciously or otherwise in substance or effect, "Ray is being punished for sleeping with Faye Lyons," or "Ray shackled up with Faye Lyons," or any other words or statements of similar import or effect or imputing that plaintiff was unchaste, or that plaintiff lived in concubinage, or that plaintiff was guilty of or had committed adultery.

III.

It is not true that plaintiff was damaged thereby in the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as exemplary damages.

IV.

In view of the foregoing findings of fact, as to the first cause of action, the Court finds it is unnecessary to make any finding of fact as to the truth of the alleged oral statements, and the Court makes no finding of fact as to the truth of the allegations of the alleged oral defamation in said first cause of action.

V.

As to the Second Cause of Action:

It is true that, by her verified cross-complaint

filed in said action No. 62839, in the Superior Court of Riverside County, California, the defendant alleged: "That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Fay Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with one said Faye Lyons at the Colonial House, Las Vegas, Nevada, where [49] cross-defendant and said Co-Respondent were registered by him as 'Ray Gilliland and Family.'"

VI.

It is true that in said action No. 62839, in the Superior Court of Riverside County, California, Ray Gilliland, as plaintiff, sued Elsinore Machris Gilliland, as defendant, for divorce; that by her cross-complaint therein, she sought a divorce against said Ray Gilliland on the grounds of extreme mental cruelty and adultery; that said cross-complaint was verified by defendant; that the allegations of said cross-complaint, complained of by plaintiff here, were material and relevant to the issues in said action.

VII.

It is true that the aforesaid allegations were made by the defendant in good faith and without malice; that, at the time said allegations were made, the defendant did have good and sufficient reason to be-

lieve, and honestly and reasonably believed that said allegations were true and that the defendant, at said time, had reasonable and probable cause for believing the truth of said allegations; that the defendant did not publish said alleged libelous statements other than by filing the said cross-complaint in said divorce action; that said acts of defendant were privileged under the provisions of Section 47, subdiv. 2(3) of the Civil Code of the State of California.

VIII.

It is not true that the plaintiff was damaged by said publication in said action No. 62839 in the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as punitive damages.

IX.

No specific defense of truth having been raised by the answer to the second cause of action, and no such issue having been set [50] forth in the pre-trial conference order, Plaintiff's Exhibit 3 herein, the Court makes no finding of fact as to the truth of the allegations of the said cross-complaint in said action No. 62839.

X.

As to the Third Cause of Action:

It is true that, on March 23, 1956, there was published in the *Riverside Daily Enterprise*, a newspaper of general circulation, an article in substance as follows: "In her counter complaint for divorce, Mrs. Gilliland accuses her husband of having affairs with two socially prominent women at Lake Tahoe

and other affairs in May, June and July of 1955 with two other women at his residence at 4717 N. 71st Pl., Scottsdale, Arizona, a suburb of Phoenix. Named as co-respondents in the counter complaint were 'Ann (Peggy) Myers' and 'Faye Lyons.' "

XI.

It is not true that said article, as published in said Riverside Daily Enterprise on March 23, 1956, was published by the endeavors of defendant, or that defendant caused said publication to be made.

XII.

It is not true that the plaintiff was damaged by any act of defendant, in connection with the publication of said article, in the sum of \$500,000.00 or any other sum or sums as compensatory damages, or in the sum of \$500,000.00 or any other sum or sums as punitive damages.

XIII.

Right of Privacy:

A. It is not true that the defendant, by any act or thing made, done or performed by her, invaded any right of privacy of the plaintiff.

Conclusions of Law [51]

From the foregoing facts the Court concludes:

I.

That plaintiff take nothing on her said first cause of action.

II.

That the filing of said cross-complaint in action No. 62839 is a privileged publication under the pro-

visions of Section 47, subdiv. 2(3) of the Civil Code of the State of California, and that by reason thereof defendant is not liable to plaintiff for said publication and that plaintiff take nothing by her second cause of action.

III.

That defendant is not liable for the publication of the article in said Riverside Daily Enterprise on March 23, 1956, and that plaintiff take nothing on her third cause of action.

IV.

That defendant is entitled to recover her costs of suit herein from plaintiff in the sum of \$.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law, It Is Ordered, Adjudged and Decreed:

I.

That the plaintiff take nothing by this action and that defendant have her costs and disbursements in this action to be hereinafter fixed on notice, and hereinafter inserted by the Clerk of this Court in the sum of \$200.12.

Dated: June 16, 1958.

/s/ WM. C. MATHES,
U. S. District Judge. [52]

Acknowledgment of Service Attached. [53]

[Endorsed]: Filed June 16, 1958. Entered June 17, 1958.

[Title of District Court and Cause.]

MOTION FOR NEW TRIAL

The plaintiff moves that the judgment entered herein be vacated and set aside and that a new trial be granted on the following grounds:

I.

Irregularity in the Pre-Trial Proceedings by the elimination of the issue of "truth" as to the slanders and libels from the case when "falsity" had been pleaded by the plaintiff and denied by the defendant;

II.

Accident at the trial in the failure by inadvertence and excusable neglect on the part of plaintiff's attorney to introduce defendant's deposition in evidence;

III.

Insufficiency of the evidence to justify the decision. The following specifications are urged: [54]

A. Finding II (a) to (g), both inclusive, are not supported by the fair weight of substantial and probative evidence, but are opposed to the weight of such evidence.

B. Finding III is not supported by the weight of substantial and probative evidence but is opposed to the weight thereof.

C. Finding IV is erroneous as setting forth a spurious excuse for omitting a necessary finding essential to the establishment of substantial justice in this cause.

D. Finding VII is opposed to the weight of substantial and probative evidence in that there is no evidence save the self-serving and self-contradicted statements of defendant herself to support the finding that she acted "in good faith" and "without malice" and that she honestly and reasonably believed that the allegations were true at the time they were made. The last three lines of said Finding are a conclusion of law.

E. Finding VIII is opposed to and is not supported by a fair preponderance of substantial and probative evidence.

F. Finding IX is erroneous as constituting a spurious excuse for omitting a necessary finding essential in the establishment of substantial justice in this case.

Dated: June 24, 1958.

/s/ WELBURN MAYOCK,
Attorney for Plaintiff. [55]

Affidavit of Service by Mail Attached. [56]

[Endorsed]: Filed June 24, 1958.

[Title of District Court and Cause.]

DEFENDANT'S MEMORANDUM IN OPPOSITION
TO PLAINTIFF'S MOTION FOR
NEW TRIAL

I.

The Court did not err in refusing to find on the issue of the truth of the charges of adultery

set forth in the cross-complaint filed by the defendant.

(A) Section 45 of the Civil Code of California defines "libel" as a "false and unprivileged publication by writing - - -, which exposes any person to hatred, contempt, ridicule, or obloquy, or which causes him to be shunned or avoided, or which has a tendency to injure him in his occupation." (Underscoring mine)

In Paragraph II of the Second Cause of Action of her complaint, the plaintiff alleged that defendant "maliciously verified and published of and concerning the plaintiff the false and malicious words following, to wit:" [57]

"That, in May and June, 1955, the cross-defendant associated with, kept, and did commit adultery with one Faye Lyons, named herein as Co-Respondent, at his residence at 4717 North 71st Place, Scottsdale, Arizona; and that, on the night of September 28, 1955, the cross-defendant did associate with, keep with him overnight, and did commit adultery with one said Faye Lyons at the Colonial House, Las Vegas, Nevada, where cross-defendant and said Co-respondent were registered by him as "Ray Gilliland and Family."

Paragraph II of the Answer to the Second Cause of Action admitted the filing of the Cross-complaint containing the said language; denied each and every other allegation of said Paragraph II of Plaintiff's Second Cause of Action not expressly admitted or alleged.

(B) The defendant did not affirmatively plead as

a special defense the truth of the said allegations of the Cross-complaint. Truth, as a defense to an action for libel or slander, must be affirmatively pleaded as a special defense.

Witkin Prac. Pleading, Sec. 540; 30 Cal. Jur. 2d "Libel and Slander" pp 145, p 769; Davis v. Hearst, 160 Cal. 143, at 187-194; Stevens v. Snow, 191 Cal. 58-64.

(C) Neither the plaintiff nor the defendant considered that truth or falsity of the allegations of the Cross-complaint were in issue. Counsel for both parties agreed to the form of the pre-trial order. No such issue was stated therein as to the Second Cause of Action. Plaintiff has waived and is precluded from asserting this issue at this time.

Fed. Rules of Civ. Proc., Rule 16; Fernandez vs. United Fruit Co. 200 Fed. (2d) 414 (1952); McCarthy vs. Lerner Stores Corporation, 9 F.R.D. 31 (1949). [58]

(D) Truth and Privilege are separate and distinct defenses. The Court can find and determine that the publication was privileged without making any finding as to truth or falsity of the publication.

Snively v. Record Publishing Co., 185 Cal. 565 at p. 575; (Note 5) Involving privilege under subsection (3) of Sec. 47 California Civil Code.

Freeman vs. Mills, 97 Cal App. (2d) 161 Involving privilege under subsection (1) and (2) of Sec. 47 Civil Code. These cases have been Shepardized and have not been over-ruled or distinguished on this point.

The Court, therefore, did not err in refusing to find on the truth or falsity of the alleged defamatory statements.

II.

The allegations of the cross-complaint were made by the defendant without malice; she had good and sufficient reason to believe and honestly and reasonably believed said allegations were true; and she had reasonable and probable cause for believing the truth of said allegation. (See Finding VII)

(A) Summary of evidence as defendant's knowledge prior to filing her Cross-complaint. The following is a summary of the defendant's knowledge at the time of filing her Cross-complaint.

Defendant testified in substance: Ray Gilliland was a habitual drinker; Ray Gilliland told her before her marriage that he had been intimate with two women in Florida. James Roach informed her that Ray Gilliland had been intimate with two women named Virginia Brown and Marilyn Lee at Lake Tahoe in July, 1954; that Ray Gilliland stopped to see them at their home, went into their bedrooms with them and later came out, that he gave them money. [59]

On January 2, 1955, she, Mr. Wm. L. Murphey and Mr. Maxwell Dorn went to Ray Gilliland's hide-away at Scottsdale; that there was lipstick on a cup of partially consumed coffee, lipstick on a lighted cigarette; that Wm. L. Murphey told her he had seen a woman's face at the bedroom curtains as they approached the house; that the defendant

told Ray Gilliland "There is a woman in this house"—that Ray Gilliland replied "So what!"

People in the neighborhood told her there were women at Ray Gilliland's house all the time. That defendant saw a photostatic copy of the registration of Ray Gilliland at the Colonial House, "Ray Gilliland and family."

She had a conversation with Wm. L. Murphey, her attorney, on the subject-matter of the Cross-Complaint charging adultery. She was present when Blanche Lampert's sworn statement was taken on November 2, 1955 (Exhibit 5).

(B) Summary of Blanche Lampert's Statement—Plaintiff's Exhibit 5.

Ray Gilliland abused Defendant over the phone; he told her she hadn't ought to live. He called her a "damned old bitch, you; you ought to die"; he threatened to shoot her. Just about every time Ray Gilliland talked to Mrs. Gilliland he called her a "bitch" or "God damned bitch". He said "How could anyone expect a guy to have anything to do with an old woman like that." He said he never would consummate the marriage.

In May, 1955, Ray was keeping Faye Lyons up at Paradise Valley Guest Ranch. I cooked [60] steak dinner for them there. One night he got mad at some friends, Blake and Kent, and Ray Gilliland went up there and stayed all night at Paradise Valley Ranch when Faye Lyons was there. Faye Lyons used to come down and stay until two or three o'clock in the morning at Ray Gilliland's house. They would sit there and drink together. Later

Mr. Gilliland and Faye Lyons went on a trip and came back. When they came back they brought Faye's boy with them. They got in a fight and Ray slapped her and she threw a glass at him—Faye Lyons broke a glass on him. When they came back she took the boy up to Paradise Valley Guest Ranch but she was down there at Ray Gilliland's house every day and I baby-sat with the boy or one of the neighbors did until two or three o'clock in the morning. She was there from May to June when she left. Ray Gilliland bought an automobile. I saw the title. He bought it on payments. Faye Lyons had it until he got mad at her and took it away from her. She drove it all the time. It was a Dodge I think he bought it from Ed Spears.

Blanche Lampert, called by the plaintiff as her witness, amplified on the incident of Ray Galliland staying at Paradise Valley in her testimony as follows:

Ray Gilliland had an argument one night. He drove Faye Lyons to Paradise Valley Guest Ranch. He did not come back that night. The next morning about 8:00 o'clock I drove my husband, Ray Lampert, to the Paradise Valley Guest Ranch where he worked as a gardener. I saw Ray Gilliland coming out of Faye Lyon's apartment. Mrs. Silverman, the owner, sure gave Ray Gilliland the dickens for staying there. [61]

This evidence was not controverted by Faye Lyons.

Mrs. Gilliland specifically testified that, at the time the Cross-complaint was verified and filed, she

did not bear Faye Lyons any ill will; she had no feeling of spite against Faye Lyons; she had no feeling of bitterness toward her; she did not bear any vindictive enmity toward Faye Lyons; and honestly believed the truth of the allegations of her Cross-complaint.

There was no evidence to the contrary except that at the time of the filing of the Cross-complaint Ray Gilliland had filed an action for divorce against the defendant upon the grounds of mental cruelty and that she had never had sexual intercourse with Ray Gilliland.

Defendant submits that Finding VII was supported by a preponderance of the evidence: that Mrs. Gilliland knew of Ray Gilliland's sexual inclination and propensity toward other women; that Ray Gilliland and Faye Lyons had opportunity to commit adultery; that the defendant honestly and reasonably believed in good faith that Ray Gilliland had committed adultery with the plaintiff; that she had reasonable and probable cause for believing the truth of said allegations; that she acted without malice toward the plaintiff in filing her cross-complaint.

III.

The Court would be justified from the evidence to find that the alleged libelous statements were true.

Without conceding the point, defendant asserts that, if the Court should believe that it is essential or proper to make a finding as to the truth of the

allegations of the Cross-complaint, there is ample evidence to support such a finding. The following is a summary of additional evidence.

(A) Faye Lyon's testimony. Faye Lyons testified in substance as follows: [62]

That she had been a chorus girl in George Cohan's production, George White's show and a vaudville act; she had been married and divorced twice; that from 1954 on she worked as a cigarette girl and hat check girl at a night spot known as L'Aiglon and the Felix Young Restaurant. In May, 1955, at the invitation of Mr. Ray Gilliland she went to Scottsdale. Ray Gilliland met her and took her to the Paradise Valley Guest Ranch. She admitted going to Ray Gilliland's house several times in the evening and that she may have had one or two highballs. The day she arrived she saw a car driving slowly near Ray Gilliland's house and she "became wary". Mr. Gilliland took her to the Paradise Valley Guest Ranch. She took a trip to Knox City in Ray Gilliland's car, stopped at Clyde Williams' home and visited with Judge Williams. After a few hours there all three drove to Forth Worth and stayed at the Hilton Hotel. They had three rooms together having interconnecting doors. She did not remember that Ray Gilliland introduced her to friends of Clyde Williams as "Mrs. Gilliland". He may have. They stayed at the Hilton Hotel for two nights. Ray Gilliland drove her to Miami, stopped at hotels on the way. Ray Gilliland registered and paid all the bills. Sometimes the rooms were adjoining but this was not of any importance. She

remained in Miami for about a week and returned to Phoenix by plane with her son. She stayed at the Paradise Valley Guest Ranch arriving about June 3rd or 4th. She remained there for about four or five weeks. Ray Gilliland and Clyde Williams brought a car there—a Dodge Sedan. [63] “He gave me the keys and said—here is a car to use. He may have said—this is your car, but I don’t remember it.” She used the car. Ray Gilliland gave her \$200.00 on one occasion to buy her son a dog. She took the money. She went out to dinner with him alone, to the Stock Yard Cafe and Italian Restaurant in Phoenix—to the movies. Ray Gilliland also took her and her son to a rodeo at Prescott but came back the same day. “Ray Gilliland wired me money for the plane trip to Phoenix.” She did not remember Ray Gilliland giving her money on other occasions but he may have.

The Testimony of Clyde Williams, offered by stipulation, was in substance as follows:

Faye Lyons and Ray Gilliland arrived at Knox City in May, 1955. They spent two or three hours at his home and that of his father Judge Williams. In the afternoon he, Faye Lyons and Ray Gilliland drove to Fort Worth and registered at the Hilton Hotel. Faye Lyons and Ray Gilliland had adjoining rooms with an interconnecting door, and Clyde Williams had a room several doors down the hall. All three spent the first evening at the Fort Worth Club; that he met some of his friends, introduced Ray Gilliland who, in turn, introduced Faye Lyons as “Mrs. Gilliland.” The next morning Ray Gilli-

land gave Faye Lyons some money to shop with. That night they had dinner at the Hilton Hotel after which Ray Gilliland and Faye Lyons retired to their rooms. I drove Ray Gilliland's car from Miami Beach to Scottsdale where I spent four or five days. Faye Lyons spent most of her [64] time at Ray Gilliland's house at Scottsdale. She hired a baby-sitter for her son. They did considerable drinking and night-clubbing. They often laughed at what Mrs. Gilliland would do if she knew what was going on. Ray Gilliland bought a new Dodge sedan, drove it with me to Paradise Valley Guest Ranch. Ray Gilliland gave Faye Lyons the keys, saying in substance: "It is all yours."

Testimony of Blanche Lampert. Blanche Lampert further testified in substance:

That she saw Ray Gilliland kissing Faye Lyons once or twice at the kitchen bar in his home. Some time in July or August of 1955, I overheard Ray Gilliland tell my husband that he would have nothing to do with women unless they came through the way he wanted them to.

Testimony of Frank Teich, Manager of the Hilton Hotel, Fort Worth, Texas. The deposition of Mr. Teich was in substance:

That during May or June, 1955, there was no registration for Ray Gilliland, Faye Lyons or Clyde Williams at the Hilton Hotel.

It may be fairly assumed that they registered under fictitious names.

Testimony of Raymond Silverman, Co-Owner of the Paradise Valley Guest Ranch. The deposition of

Raymond Silverman (Plaintiff's Exhibit 10) was in substance:

That there was no registration for Ray Gilliland or Faye Lyons at the Paradise Valley Guest Ranch.

The foregoing evidence, together with the evidence heretofore summarized, establishes by the great preponderance of the evidence that Ray Gilliland did commit adultery with Faye Lyons.

The act of adultery, like any other fact, may be established by circumstantial proof. Indeed, that is the usual way in which it [65] is proven.

Evans v. Evans, 41 Cal. 103.

Aston v. Aston, 14 C.A. 323. Circumstantial evidence suffices as proof of adultery.

Wilson v. Wilson, 124 C.A.655, 13 P.2d 376. Notwithstanding the denials of the parties, evidence of sexual inclination and of reasonable opportunity is almost invariably accepted by the courts as sufficient proof of adultery.

Schaub v. Schaub, 71 C.A.2d467, 162 P.2d 966 (citing Cal. Jur.)

The Court has jurisdiction to vacate the judgment and make a finding on the truth of the allegations of the Cross-complaint under Rule 59 of the Federal Rules of Civil Procedure. However, Defendant insists this finding is not essential.

Respectfully submitted,

/s/ WM. L. MURPHEY,
Attorney for Defendant.

[Endorsed]: Filed July 25, 1958. [66]

[Title of District Court and Cause.]

PLAINTIFF'S REPLY MEMORANDUM

Defendant devotes the first two and one-half pages of his Memorandum in Opposition to Plaintiff's Motion for New Trial to the proposition that the Court did not err on refusing to find on the issue of truth of the charges of adultery. Plaintiff will use defendant's own paragraph designation for the sake of clarity.

Page 1, par. A: This is historical only and serves as an opening explanation of the argument.

Page 2, par. B: This quotes law upon the undisputed proposition that Truth as a defense in an action of libel must be affirmatively pleaded as a special defense. Plaintiff agrees and will save the Court the labor of consulting:

Witkin, Practice and Pleading,

Davis vs. Hearst, 160 Cal. 143,

Stevens vs. Snow, 191 Cal. 58.

Page 2, par. C: Plaintiff must take issue here with the statement that "neither plaintiff nor defendant considered that [67] truth or falsity of the allegations of the cross-complaint were in issue". The evidence taken applied without restriction to all three causes of action. Defendant combed the life of plaintiff and the various states in which she lived in an attempt to prove her a lewd and dissolute woman. Pages 6 to 12 of his Brief recount the evidentiary scraps upon which it is claimed that the Court is justified in making a finding of "truth"

of the defamatory matter. In the face of all this, to allege that neither party "considered truth or falsity" is just not so.

Defendant quotes Rule 16 F.R.C.P. but gives no weight to the stated exception giving the Trial Court the right to modify to prevent manifest injustice.

The cases of *Fernandez vs. United Fruit Co.* 200 Fed. 2d 414, and *McCarthy vs. Lerner Stores*, 9 F.R.D. 31, both lay down the rule that if a party wishes to inject new issues at the trial he should ask to amend the pre-trial order. This is the rule on appeal. It is not the rule in the Trial Court where this case now lies before the Trial Judge who has jurisdiction to modify the pre-trial order in the interest of manifest justice.

But it is not the reinstatement of an issue which plaintiff seeks. Manifest justice requires a finding of an admitted fact, to wit: the fact that the defamatory matter was false. This is the state of the pleading. "Truth cannot be raised by a denial on the general issue". (See cases *supra* under par. A.)

The admitted fact should be the subject of a finding. The Court cannot legally find against an admitted fact. Nor can the Court legally leave the issue in doubt as it has done in this case. A woman who has a right to a finding that the accusation of adultery is false is not given justice by a finding that the Court decided not to find one way or another. This merely perpetuates the slur and gives rise to the inference that the accusation was true but that the Court mercifully kept silent. A [68]

woman of good character and a woman of doubtful character stand far apart in social esteem.

As to the libel in the second cause of action, plaintiff has a right to a finding on an admitted fact. Manifest injustice will result by giving her anything less.

Niceties of argument which lose sight of the purposes of Rules of Civil Procedure for District Courts should find no place in the interpretation of such rules. *Thomas French & Sons, Ltd., vs. Carleton Venetian Blind Co.*, 1 F.R.D. 178-9.

Page 3, par. D: Plaintiff concurs that Truth and Privilege are distinct defenses in a libel action. Why then does defendant recoil from the obvious deductive conclusion that if truth is not pleaded, falsity is admitted and the Court should so find? A startling non-sequitur is proposed instead, i.e. "The Court, therefore, did not err in refusing to find on the truth or falsity of the alleged defamatory matter". At this point logic shrieks as Freedom is said to have shrieked when Kosciusko fell.

When a woman is untruthfully defamed in a privileged libel, she is entitled to some remedy. Self-help is denied her. Compensatory damages is denied her. But the law does not completely fail her. She can have at least such official finding of her good character as follows from the official finding that the defamation was false. Section 3523, Civil Code of California, is a hideous lie if this is not true. No better proof of the malice of the defendant in this case can be shown than the record of persistent and unflagging insistence at all times in

this litigation that her slur shall be perpetuated and given official sanction by this honorable Court.

Defendant next seeks to show that her defense of privilege was good and that she carried her burden of proof of the following facts: [69]

1. That she acted without malice,
2. That she had good and sufficient reason to believe the allegations were true,
3. That she honestly and reasonably believed them,
4. That she had reasonable and probable cause for believing them.

Plaintiff respectfully submits that defendant has failed to carry her burden on any of the four propositions listed.

The learned Court at oral argument narrowed the argument considerably by conceding three basic points:

1. Defendant must rely solely upon information she had at the time of publication of the libel,
2. What is reasonable or probable or sufficient must be tested by the standard of a "reasonable man" and not by her subjective standard,
3. Defendant is bound by her own testimony as to the nature and extent of the information upon which she relied.

At the time of the publication she had and relied upon this information and no other:

1. The Blanch Lampert Statement, Exhibit 5,
2. What her husband had told her, prior to their marriage,

3. What neighbors had said and what James Roche said,

4. What her attorney told her,

5. The incident of Jan. 2, 1955, i.e., lipstick and a woman viewed by her attorney through a window,

6. Photostat of Colonial Inn registration.

Can what her husband told her before her marriage provide any "reasonable", or good and sufficient reason or give reasonable or probable cause for a reasonable man to accuse Fay Lyons of adultery on the night of September 28, 1955 at the Colonial Inn in Las Vegas with Ray Gilliland? One must answer "yes" to this absurdity if conditional privilege depends upon this evidence as [70] necessary. The attitude of the Court at oral argument convinces counsel that this evidence is worthless.

The neighbors merely stated that they had seen women playing in defendant's husband's yard. No women were identified. The neighbors stand unidentified. No time was stated. This evidence and that of James Roche about a Lake Tahoe incident with other women cannot justify defamation of Fay Lyons in Arizona and in Nevada.

The attorney's statement is valueless because we do not know what he said. The attorney's peeping into the window is valueless because he does not state who the woman was. The incident of the lipstick on Jan. 2, 1955 is wholly unrelated to Fay Lyons who came to Arizona twice during the summer of 1955, i.e., in June and in July.

If this sort of testimony justifies an accusation

of adultery, the world has become a paradise for gossips and scandalmongers.

It is true that insufficient evidence standing alone can be cumulated into significance by adding additional evidence. This rule is but the mathematical truth that any positive number added to another positive number will equal a sum greater than either taken alone. We urge another rule that evidence wholly unrelated or not legally relevant cannot be cumulated into relevant evidence. Here we approximate the other mathematical truth that zeros can be infinitely added to zero and the sum will still be zero.

The photostat of the Colonial Inn register in Las Vegas is in no way connected with Fay Lyons. The defendant was told by Blanch Lampert that Fay Lyons did not go to Las Vegas, but on the contrary went home to Miami. Lampert Statement, Exhibit 5, p. 12, lines 2-4.

It follows that any justification for the libel or proof to sustain privilege must be found in the Blanch Lampert Statement, [71] Exhibit 5. The defendant first testified that all she knew about her accusations of Fay Lyons at the time of publication came from Blanch Lampert and Ray Gilliland. We have eliminated the Ray Gilliland Statement as valueless, being made years before and prior to his marriage to defendant.

Partial Transcript, p. 18, Question by the Court: "The question is, as I understood it, did you have any other information except what you heard at

that deposition (Exhibit 5) and what your husband told you?"

Witness (defendant): "No, I did not".

(Note: Parentheses supplied for clarification.)

The defendant also testified that she first met Blanch Lampert at the taking of her statement Exhibit 5 and never talked with her again prior to the publication of the libel. Reporter's Partial Transcript, p. 15.

Plaintiff suggests that a reading of some seventy lines in Blanch Lampert's Statement constitutes the sole justification which Defendant urges to sustain her burden of proving "good faith", "lack of malice", "good and sufficient reason to believe", and "reasonable and probable cause to believe" that Fay Lyons committed adultery with defendant's husband at specific times and places in Arizona and Nevada. Plaintiff rests her reputation on the proposition that the Blanch Lampert Statement fails to present any facts which would lead a reasonable man to honestly believe that plaintiff was an adulteress.

"By their fruits ye shall know them." Counsel at oral argument urged the well-considered rule that the subjective events of a person are more accurately revealed by the conduct than by the words of the subject. Quotations from the Sermon on the Mount, the Philosophers, and the Poets coincided with the changeless wisdom of the East in establishing this maxim. Perhaps I [72] quoted too much, so I will not repeat my sources here. I only quoted to show that what I said was based upon

a higher authority than that afforded by my own unaided thought.

At the trial, defendant, out of context and purely by volunteer statement, ventured the highly self-serving assurance that "I bear no malice against these people, not any whatsoever". Rep. Partial Transcript, p. 17, lines 14-15. This is what defendant says. Let us draw a few inferences from what she does:

1. She swore to the truth of the specific libels on the sole evidentiary basis of the Blanch Lampert Statement,

2. She made no effort to serve Fay Lyons, although she knew Fay Lyons lived in Miami, Exhibit 5, p. 6, line 16, p. 12, line 3,

3. She did not seek substituted service as provided in Sec. 1019, C.C.P.,

4. She made no attempt to press the adultery charge,

5. Only when sued for libel did she scour the country to seek out Fay Lyons and to seek out all phases of her life from childhood onward, eager to find something to complain of and upon which an inference could be built up that Fay Lyons was an adulterous woman,

6. She admits the defamatory matter in the libel is untrue by merely pleading to the general issue. This is an admission as a matter of law. Evidence for the purpose of proving truth is not even admissible in evidence. *Davis vs. Hearst*, 160 Cal. 143, at 194, lines 11-16.

The proviso in C.C.C. 47-2 upon which defendant relies was not enacted until many years after Davis vs. Hearst, but what was admissible only for justification by way of mitigating damages at the time of Davis vs. Hearst, *supra*, is now admissible only for justification because privileged in our present code. Thus, not only is falsity admitted by the pleadings, but proof of truth by [73] the defendant was prevented by the inadmissibility of evidence for such purpose.

7. Note defendant's pretense of injured innocence in the Blanch Lampert Statement when she breaks into the statement with a self-serving declaration, p. 4. This was clearly a prompting of Blanch Lampert. Note how Blanch obliges and defendant's attorney pursues the point. The eagerness for unfair advantage is compatible with a malicious motive, not with an honest one.

8. After suit, when her investigation, nation-wide in scope, as shown by the questions asked Fay Lyons on her deposition and on cross-examination, failed to prove adultery, she persisted in striving to perpetuate her slur under cover of court procedure. A noble nature admits a wrong and seeks to make reparation. When the opposite conduct is shown, the conclusion is justified that the opposite nature dictated the conduct and that malice and not nobility supplied the motive.

9. And now even after trial when the terror of monetary loss has been removed, see how she seeks to perpetuate her unproven slur by fighting to prevent the pitiful effort of a mother to recapture

a few shreds of reputation for the consolation of her little son.

I omit consideration of all evidence related at the trial and set forth at p. 5, lines 22-32 and p. 6, lines 1-21 of defendant's brief for the obvious reason that we are only considering justification as of November 26, 1955. What defendant was told thereafter at the trial can have no bearing on the question of justification or privilege as of the date of publication, Nov. 26, 1955. *Davis vs. Hearst*, 160 Cal. 143, at p. 195.

Par. III, p. 6-10: Defendant obstinately refuses to observe his own authorities in this section of his brief. Defendant [74] did not plead Truth. Therefore Falsity stands admitted. Pleading by denial, to the general issue, does not raise the issue of Truth. The evidence referred to is only admissible to prove the elements of conditional privilege and not for the purpose of proving the "truth" of the libel. *Davis vs. Hearst*, (*supra*).

The cases cited in defendant's brief p. 10 to the effect that adultery can be proved by circumstantial evidence are not relevant. They are not objected to; they merely do not apply. We are contending for a finding on an admitted fact. A trial court cannot make a finding in conflict with an admitted fact.

Rebuttal

Having now completed answer to defendant's brief, plaintiff, at the risk of being repetitious, will briefly recapitulate her position in chief.

I.

1. Malice is inferred from the publication. C.C.C. sec. 48, *Davis vs. Hearst* (supra).

2. A person intends the ordinary consequences of his voluntary acts. C.C.P. 1963:3.

3. The following presumptions and no others are deemed conclusive: a malicious and guilty intent from the deliberate commission of an unlawful act done for the purpose of injuring another * * * C.C.P. 1962:1.

4. A true or false defamation is a crime. Sec. 248, 249, Calif. Penal Code. Truth plus justification is a complete defense. Sec. 251, Calif. Penal Code.

The alleged libel was published November 26, 1955. If defendant can legally prevail she must affirmatively prove conditional privilege as of that date. The only justification in evidence and the sole legally relevant evidence against Fay Lyons is the Blanch Lampert Statement. If that statement justifies specific charges of adultery by Fay Lyons at specified times and in [75] specified places, defendant will have sustained the burden of proof as to privilege. If that statement does not justify specific charges of adultery by Fay Lyons at Specific times and in specific places, defendant has not proved privilege and the decision is erroneous.

II.

The Court erred in failing to find that the defamatory matter was false. It appears that the error, on the part of defendant's counsel at least,

stems from not properly distinguishing an "issue" from a "finding". Material facts admitted in the pleadings leave no "issue" but still require a "finding". On appeal the Courts assume the finding sometimes to correct the unsubstantiated judgment of the Court below, the Court treating them as if they were properly found. *Mondini vs. Labaig*, 44, Cal. App. 781, *Sacre vs. Chalupnik*, 188 Cal. 386, *Estate of Cover*, 188 Cal. 133.

A finding by the Court against a material admission in a pleading is a ground for reversal. *Estate of Cover* (supra), *Faulkner vs. Rondoni*, 104 Cal. 140, *Romer vs. Wehner*, 61 C.A. 411.

Finding X is against a material admission and is therefore such error as constitutes a ground for reversal. Plaintiff's right to a finding of "falsity" is not satisfied by a finding which leaves the matter in doubt and affords justification for scandalous inferences of truth.

The legal agility by which the learned Court avoided a finding in causes of action 1 and 3 where "truth" was pleaded by "not reaching the issue" and in the second cause of action where truth was not pleaded by was reached, by the expedient of juristically jumping over the obstacle and finding on the issue of privilege which would not have been reached at all if "truth" had been found, does not afford a good pattern for judicial precedent and is discordant with the harmonious judicial character of this Court.

"Fiat justitia ruat coelum" was disregarded. Doubtless other worthy maxims from other fields provided the more attractive solution.

Counsel feels that he could show no more respectful regard for this Court than is being shown in this proceeding by affording this opportunity for reconsideration and correcting this finding.

Necessity of Finding of Falsity

A last instance of venom on the part of defendant is the parting shot of her attorney, p. 10, lines 11-13. Here, under the pretense of quoting a rule of Court, a distortion, engendered in malice, occurs. Rule 59 does not give this Court jurisdiction "to vacate the judgment and make a finding on the truth of the allegations". It merely provides in this context that the Court may amend or make new findings. The statement on its face asserts that the power can be exercised in only one way. "*Expressio unius est exclusio alterius*".

And now we come back like the grief-stricken children over Mignon's grave to plead for justice. And only as suppliants does our law permit us to come.

"For every wrong there is a remedy". This maxim was intoned by the juris-consults of ancient Rome, has been enshrined in the Pandects of the monumental Code of Justinian and has been rewritten as Section 3523 of the Civil Code of the State of California.

To falsely accuse a woman of adultery is a wrong. If it is done under conditions of privilege, the wrong is not removed. The legal remedy, however, has been seriously impaired. Like the owner of an outlawed note, the right remains, but the

remedy is withheld. Since the reign of Theodosius II, matters of public policy have justified the withholding of the remedy, leaving the right unimpaired. Considerations of Public Policy also impelled [77] the statutory doctrine of privilege, but only insofar as immunity of the libellant was concerned. Insofar as power still remains in a Court to do justice and let right prevail, it is the obligation of the Court to do it. If some of the value of reputation can be salvaged by a judicial finding of the falsity of the charge, a Court cannot legally escape its obligation by withholding this available form of relief.

Respectfully submitted,

/s/ WELBURN MAYOCK,

Attorney for Plaintiff. [78]

Affidavit of Service by Mail Attached. [79]

[Endorsed]: Filed August 5, 1958.

[Title of District Court and Cause.]

ORDER ON PLAINTIFF'S MOTION FOR A NEW TRIAL

This cause having come before the Court for hearing on plaintiff's motion, filed June 24, 1958, for a new trial; and the motion having been argued and submitted for decision;

It Is Ordered that plaintiff's motion for a new trial is hereby granted as to plaintiff's second claim or cause of action only, and that in all other respects the motion for a new trial is hereby denied. [See: Cal. Civ. Code § 47-2 (3); *Davis vs. Hearst*, 160 Cal.

143, 195, 116 Pac. 530, 552 (1911); Tingley vs. Times-Mirror Co., 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).]

It Is Further Ordered that the case is hereby placed on calendar for Pre-Trial Conference pursuant to Local Rule 9 at 9:30 A.M. on November 3, 1958, and that formulation and presentation of an amended Pre-Trial Conference [80] order in accordance with Local Rule 9 (j) shall constitute sufficient compliance with the pre-conference requirements of the rule.

It Is Further Ordered that the Clerk this day serve copies of this order by United States mail upon the attorneys for the parties appearing in this cause.

September 29, 1958.

/s/ WM. C. MATHES,

United States District Judge.

[Endorsed]: Filed September 30, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, defendant above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from that portion of the Order on Plaintiff's Motion for a New Trial of the above entitled cause, entered in this action on the 30th day of September, 1958, which provides as follows:

"It Is Ordered that plaintiff's Motion for a New Trial is hereby granted as to Plaintiff's Second Claim or Cause of Action only. * * * (See: Cal. Civ. Code § 47-2 (3); Davis v. Hearst, 160 Cal. 143, 195, 116 Pac. 530, 552 (1911); Tingley v. Times-Mirror Co., 151 Cal. 1, 26, 89 Pac. 1097, 1107 (1907).)"

Dated: October 30, 1958.

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Attorneys for Defendant. [82]

Proof of Service by Mail Attached. [83]

[Endorsed]: Filed October 30, 1958.

[Title of District Court and Cause.]

CERTIFICATE BY THE CLERK

I, John A. Childress, Clerk of the above-entitled Court, hereby certify that the items listed below constitute the transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit, in the above-entitled case:

A. The foregoing pages numbered 1 to 94, inclusive, containing the original:

Complaint, filed 8/9/56

Amended Complaint, filed 11/20/56

Notice of Motion to Strike from Amended Complaint, with memorandum of points and authorities in support thereof

Minute Order 12/10/56

Answer to Amended Complaint
Pre-Trial Conference Order (Plaintiff's Exhibit 2)

Findings of Fact, Conclusions of Law and Judgment

Motion for New Trial

Defendant's Memorandum in opposition to Plaintiff's Motion for New Trial

Plaintiff's Reply Memorandum

Order on Plaintiff's Motion for New Trial

Notice of Appeal

Designation by Appellant of the Record on Appeal

Affidavit and Order for extension of time for filing and docketing record on appeal, filed 12/10/58

Affidavit of service by mail re affidavit and order for extension of time, etc., re appeal, filed 12/15/58

Stipulation and Order extending time for filing and docketing record on appeal, filed 1/14/59

Stipulation and Order extending time for filing and docketing record on appeal, filed 2/17/59.

B. Plaintiff's Exhibits 1 to 12, inclusive.

Defendant's Exhibits A to D, inclusive.

C. Five volumes of Reporter's Official Transcript of proceedings had on:

June 3, 1958; June 4, 1958; June 5, 1958; and July 21, 1958.

Dated: February 27, 1959.

[Seal] JOHN A. CHILDRESS,
Clerk,

/s/ By WM. A. WHITE,
Deputy Clerk.

In the United States District Court, Southern
District of California, Central Division

No. 20301-WM

FAY LYONS,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

No. 20302-WM

ANN MEYER,

Plaintiff,

vs.

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Defendant.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California
Tuesday, June 3, 1958

Honorable William C. Mathes, Judge Presiding.

Appearances: For the Plaintiff: Coit I. Hughes,
Esq., 208 West 8th Street, Los Angeles 14, Cali-
fornia. For the Defendants: Messrs. Wm. L. Mur-
phey and John B. Anson, 835 Rowan Building, Los
Angeles 13, California. [2]*

* * * * *

The Court: I have been over the pretrial con-

* Page numbers appearing at top of page of Reporter's Tran-
script of Record.

ference orders. I assume the originals have been signed. Have they?

Mr. Murphey: That is my information, your Honor.

The Court: I assume that Judge Hall signed them. I haven't seen the originals. I was only looking over the copies in my own file.

Are they signed, Mr. Clerk?

The Clerk: Yes, your Honor, they were signed on May 12th.

The Court: You may proceed then, Mr. Hughes.

The clerk has handed me a stipulation as to certain facts in the Lyons case, Case No. 20301, signed by the parties.

Have any exhibits been marked? [4]

Mr. Hughes: Just those attached to the pretrial order that are stated in the pretrial order, your Honor.

The Court: I don't believe they are stated to be marked. They are listed. Have any of them been marked by the clerk?

Mr. Hughes: No, sir, they have not.

The Court: Do you wish to offer the stipulation in the Lyons case?

Mr. Hughes: I do.

Mr. Murphey: No objection.

The Court: Received in evidence. The clerk can file it and mark it Exhibit 1 in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 1 and received in evidence in Case No. 20301-WM.) [5]

ELSINORE MACHRIS GILLILAND

called as a witness by the plaintiff, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Elsinore Machris Gilliland.

Direct Examination

Q. (By Mr. Hughes): Where do you reside, Mrs. Gilliland?

A. 475 Borrado Norte, Palm Springs, California.

Q. Were you married to one Ray C. Gilliland?

A. I was.

Q. What was the date of your marriage?

A. May 3, 1953.

Mr. Murphey: Stipulated it was 1954, counsel, if you desire.

The Witness: '54.

Mr. Murphey: Do you desire the stipulation?

The Court: Do you accept the stipulation, Mr. Hughes?

Mr. Hughes: Yes, your Honor, but I will appreciate [7] it if counsel wouldn't interrupt the witness like that to lead her in that way.

The Court: Well, I don't know whether the date is crucial or not. I assumed it wasn't. So it may as well be correct.

Mr. Hughes: No, it wasn't.

Q. (By Mr. Hughes): Mrs. Gilliland, where did you live on May 4, 1954?

A. On May 4, 1954, I lived at 475 Borrado

(Testimony of Elsinore Machris Gilliland.)

Norte, Palm Springs. Also, at 1035 Orange Grove Avenue, Pasadena.

Q. Did Mr. Ray C. Gilliland reside with you at those addresses on those dates? A. Yes.

Q. Did he reside with you in September 1954?

A. I believe he had left in September.

Q. Where did you reside in September?

A. 1035 Orange Grove Avenue, Pasadena.

Q. And where did Mr. Gilliland reside?

A. I do not know. I think it was in Arizona at the Westward Ho.

Q. Did you file an action against Mr. Gilliland in Nevada in the fall of 1954?

A. Nevada? No, sir.

Q. Where did Mr. Gilliland reside in January of 1955?

A. 1955? I believe he resided in Scottsdale in 1955. [8]

Q. And where was that in Scottsdale?

A. It was out at Thornwood Acres. That is all I know. I do not remember the address. 71st Street, I think.

Q. Did you reside in Scottsdale in January 1955? A. Yes.

Q. Where did you reside?

A. On Sajuaro Road.

Q. When did you commence to reside on Sajuaro Road in Scottsdale, Arizona?

A. It was in the spring of 1955, I believe.

Q. When did Mr. Gilliland commence to reside in the house on 71st Street?

(Testimony of Elsinore Machris Gilliland.)

A. I do not know. He had the house and he would go there from time to time as a hideaway. I didn't know anything about the house for months.

Q. When did you purchase the house then up on Sajuara Road? A. I beg your pardon?

Q. Did you purchase the house on Sajuara Road? A. Yes, sir.

Q. When was that?

A. I purchased it in November 1954, I think. I am not sure.

Q. Did Mr. Gilliland ever reside in that house on Sajuara Road with you? [9]

A. No, he did not.

Q. Where did he reside during that time?

A. On 71st Street.

Q. And what was that, four or five blocks from your Sajuara Road house? A. Several miles.

Q. Did you file a lawsuit against Mr. Gilliland in January 1955? A. I think I did.

Q. Did you file a lawsuit, too, in Maricopa County, Phoenix, Arizona; and one in Los Angeles County, Los Angeles, California?

A. I believe so.

Q. Can you tell me what happened to those lawsuits? A. We became reconciled.

Q. What was the subject matter of those lawsuits?

Mr. Murphey: Just a moment. I will object to this line of questioning as being incompetent, irrelevant and immaterial, not having any bearing whatsoever on any of the issues of this case .

The Court: What is the purpose of it?

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: The purpose of this line of questioning, your Honor, is to establish that these two persons were in a long line of feuding; that——

The Court: Perhaps that can be stipulated, can't it? [10]

Mr. Murphey: I will stipulate that Mr. and Mrs. Gilliland separated and reconciled several times.

The Court: Does that cover it?

Mr. Hughes: I don't believe so, your Honor, because I am going——

Mr. Murphey: I will be more specific, with the court's permission. I will stipulate, Mr. Hughes, that in January 1955 she filed a suit for annulment and a divorce against Mr. Gilliland at Riverside. She filed a suit to collect two promissory notes aggregating \$350,000 against Mr. Gilliland, one in Maricopa County, Arizona, and one in Los Angeles County, California, and one in Reno, Nevada upon the promissory notes.

I will stipulate that later, and as I recall about May or June of 1955, each of those suits was dismissed without prejudice; that time there being apparently a reconciliation.

The Court: So stipulated?

Mr. Hughes: Well, if your Honor please, there is a correction there. No. 1 is that the actions in Reno, Nevada, and Los Angeles and Maricopa Counties were filed on or about January 4, 1955.

The Court: Mr. Hughes, unless there is some point in it, I assume that when a man and his wife

(Testimony of Elsinore Machris Gilliland.)
are fighting each other in divorce courts there is no particularly good [11] feeling between them.

Now, does that help any?

Mr. Hughes: That helps, your Honor.

The Court: I don't suppose there would be any opposition to that assumption on the part of the defendant.

Mr. Murphey: Not while they are fighting.

Q. (By Mr. Hughes): Mrs. Gilliland, you filed an action for annulment known as Proceeding 61361 in the County of Riverside, State of California, and the action was filed March 8, 1954. Do you recall? A. 26161.

Mr. Murphey: Objection, if the court please, as incompetent, irrelevant and immaterial; outside the issues of the facts as framed by the pretrial order. Also, the basic fact has been stipulated that it had been filed.

Mr. Hughes: If your Honor please, there is an allegation in the——

The Court: Why don't you offer the pretrial order. That covers it, doesn't it? It covers a great many facts that are admitted. Do you want to offer those, or read them into the record? I think you might save a great deal of time if you just offer the pretrial conference order in each case. It covers practically everything, doesn't it?

Mr. Hughes: Well, your Honor, it covers practically everything except the parts which I filed the motion to be [12] heard on yesterday; and this is part of the foundation leading up to the testimony

(Testimony of Elsinore Machris Gilliland.)
in regard to that motion.

The Court: The objection will be sustained at this point.

Do you wish to offer the pretrial conference order?

Mr. Hughes: Yes, your Honor, I do.

The Court: In the Lyons case it will be received as Exhibit 2, and in the Meyers case as Exhibit 1.

(The exhibit referred to was received in evidence as Exhibit 2 in Case No. 20301-WM and Exhibit No. 1 in Case No. 20302-WM.)

Mr. Hughes: In addition to the documents listed in the pretrial conference order, your Honor, plaintiff wishes to introduce into evidence the cross-complaint for divorce in No. 62839 in Riverside County.

Mr. Murphey: As a matter of inquiry, your Honor, by him offering the pretrial order, am I to assume that the documents thereto that are attached are offered?

The Court: Are there some documents attached to the pretrial order?

Mr. Murphey: Yes, your Honor.

The Court: I should assume that everything that is a part of the order is in. I had no knowledge of any documents being attached.

Mr. Murphey: Well, I will object. [13]

The Court: What is attached?

Mr. Murphey: Well, there are letters and other documents for which there is absolutely no foundation.

(Testimony of Elsinore Machris Gilliland.)

The Court: Attached to the pretrial conference order?

Mr. Murphey: That is my understanding of the documents.

The Court: Well, let's find out. I never heard of such a practice. I never heard of exhibits being attached to the pretrial conference order.

Mr. Murphey: Statements of exhibits that counsel proposes to offer.

The Court: Well, there may be a list of exhibits, but that doesn't mean anything.

Mr. Murphey: Well, that's all right, but——

The Court: It is just a listing, isn't it?

Mr. Murphey: Yes. But I don't want to be understood as not objecting to the documents attached.

The Court: Very well.

Mr. Murphey: As to the current document I will object as being incompetent, irrelevant and immaterial in view of the pretrial order determining the allegations in the cross-complaint in this action. They have been admitted by the pleadings and the pretrial order.

The Court: The clerk calls my attention to the [14] fact that there's attached to the pretrial conference order in the Lyons case a registration, a definitive statement with respect to it, apparently a photocopy. "Colonial House registration." That is all that appears to be attached to the pretrial conference order in that case.

Do you have the other one, Mr. Clerk?

What is the purpose of offering the cross-com-

(Testimony of Elsinore Machris Gilliland.)

plaint? It's admitted that you allege certain facts. Isn't that all you want to show? Is there any particular reason to have the document?

Mr. Hughes: Well, there are other things alleged in the cross-complaint which I think are evidence of malice injected here.

The Court: Very well. It will be received in evidence.

Why did you put it in the pretrial conference order? Why did you put it in the agreed facts. There is no need of duplicating. We have just wasted time in pretrial conference if you are going to do it all over in the courtroom now.

Very well. It will be received in evidence. In what case?

Mr. Hughes: Both of them, your Honor.

The Court: In both cases.

We will receive it in the Lyons case Exhibit 3. Is that right, Mr. Clerk? The minute complaint, the cross-complaint. [15] It's on your desk there, is it not?

Do you see it, Mr. Clerk?

The Clerk: I see it now, your Honor.

The Court: It will be Exhibit 3 in the Lyons case and Exhibit 2 in the Meyers case.

(The exhibit referred to was received in evidence as Exhibit 3 in Case No. 20301-WM and Exhibit No. 2 in Case No. 20302-WM.)

The Court: I don't find any exhibits at all attached to the pretrial conference order in the Meyers case.

(Testimony of Elsinore Machris Gilliland.)

Q. (By Mr. Hughes): Mrs. Gilliland, were you in Riverside, California, on December 20, 1955?

Mr. Murphey: I would object to the question as being incompetent, irrelevant and immaterial; not the date determined as an issue of fact under paragraph V, subparagraph 2.

The Court: Please read the question, Mr. Reporter.

(Question read.)

The Court: Overruled. You may answer.

The Witness: I do not know. I do not remember the dates. I was in Riverside, but I do not remember what dates.

Q. (By Mr. Hughes): Did you have a conversation with one Ida Barr in the Mission Inn on or about that date? A. I believe so.

Q. Where did this conversation take place? [16]

A. In the lobby at the Hotel Mission Inn.

Q. And who was present?

A. Just Miss Barr and myself.

Q. Do you recall what was said?

A. Yes. I asked her how Mr. Gilliland was doing. He was very ill. He had been ill. He had been operated on and he was in court, going to court. And I asked her what condition he was in. And that is all.

Q. That was all you said?

A. That is all I said. She answered me.

Q. You didn't say anything else besides, "How are you? How is Mr. Gilliland?"

(Testimony of Elsinore Machris Gilliland.)

A. I asked her how Mr. Gilliland was, how he was coming on.

Q. Did she say anything to you?

A. She told me he was not very well, that he was a very sick man.

Q. And this was December 1955, the 20th?

A. I believe so.

Q. Did you see Mr. Gilliland in November of 1955? A. I do not remember.

Q. Did you see and talk to him at the St. Joseph's Hospital in November 1955?

A. No, I did not. 1955? When was that conversation in Riverside?

Q. December 1955. [17]

A. No, I did not see him at St. Joseph's Hospital in 1955.

Q. Did you see him when he was operated on the first time? A. No, I did not.

Mr. Murphey: I am going to object.

The Court: There is nothing before the court.

Put your next question.

Mr. Murphy: I move to strike the last answer for the purpose of objecting to the question as being incompetent, irrelevant and immaterial to any issue in this case.

The Court: The motion is denied.

Your next question, Mr. Hughes?

Mr. Hughes: Yes, your Honor.

Q. (By Mr. Hughes): Do you recall the 26th day of November, 1955?

(Testimony of Elsinore Machris Gilliland.)

A. The 26th day of November, 1955? No, I do not. What happened?

Q. Do you recall having a conversation with a Mr. John Anson on the 26th day of November, 1955?

A. I do not remember.

Q. Do you recall having a conversation with a Blanch Lampert in November 1955?

A. I do not remember what date.

Q. Do you recall having a conversation with her? [18]

A. Yes.

Q. Would it improve your memory if I told you that this conversation was November 2, 1955?

A. I wouldn't remember dates.

Q. Where were you when you conferred with Mrs. Blanch Lampert?

A. In Scottsdale, Arizona.

Q. And what was the reason for conferring with her?

A. I think my attorneys came down for some depositions.

Q. What was the purpose of the depositions?

A. For my divorce.

Q. Did you talk to Mrs. Blanch Lampert in regard to taking her deposition on a divorce prior to November 2, 1955?

A. I did not.

Q. You never spoke to her before you took the deposition?

A. No. My attorneys did.

Q. Your attorneys spoke to her before then?

A. I do not know.

Q. But you never spoke to her?

A. No.

(Testimony of Elsinore Machris Gilliland.)

Q. Were you present in the room when the deposition was taken? A. Yes.

Q. And you heard her testimony? [19]

A. Yes.

Q. Can you recall in substance her testimony?

A. I think it is all down there in black and white. You can read it.

Q. Do you recall what her testimony was, Mrs. Gilliland? A. Yes.

Q. What was her testimony?

A. Well, she told me about two women who visited at Mr. Gilliland's home.

Q. Had been what?

A. Had been visiting at Mr. Gilliland's home in Scottsdale. I did not know about the women beforehand. I didn't know what their names or what they looked like.

Q. And what did she tell you about the two women visiting at Mr. Gilliland's home in Scottsdale?

A. That they stayed there. I believe that one woman stayed there for several weeks as a guest, and the other one came in. She was living at some motel in the neighborhood.

Q. Who was living at some motel?

A. Miss Faye Lyons was living at a motel in the neighborhood.

Q. And that is what Mrs. Lampert told you?

A. Right.

Q. Did she tell you anything else? [20]

A. No, not very much. It seems one morning

(Testimony of Elsinore Machris Gilliland.)

early I called up Mr. Gilliland and some woman answered the phone.

Q. Do you recall that?

A. I recall that I called up Mr. Gilliland early one morning and this woman said, "My God, it's your wife." And she got hysterical on the phone. And I had to wait several minutes before Mrs. Lampert answered the phone. They called her to the phone to answer it.

That is all I know. The woman was hysterical when she answered it.

Q. Was Mrs. Lampert in the house?

A. Mrs. Lampert lived on the place. I believe she got their breakfast. I do not know.

Q. She was the—— A. Housekeeper.

Q. ——housekeeper, and her husband lived on the place? A. Right.

The Court: Let's move this along, Mr. Hughes. It is hard to keep my mind on it, you are so slow.

Q. (By Mr. Hughes): Did Mrs. Lampert say anything to you that Faye Lyons or Ann Meyers had committed adultery with Ray Gilliland?

A. She spoke to my attorneys, not to me. My attorneys took the depositions. I didn't.

Q. Did you ever have any information other than that [21] which you got from Blanch Lampert that there was adultery committed?

A. No—yes, I did. I beg your pardon. Mr. Gilliland told me he went to Florida and had two women down there that he——

(Testimony of Elsinore Machris Gilliland.)

Q. One moment, please. When did he tell you this?

A. Before we were married. And then he told me so afterward in San Francisco.

Q. He told you before you were married that he went to Florida?

A. Yes. There were two women down there he had been intimate with.

Q. One moment, please. Please try to answer the question. A. Yes, sir.

Q. He told you before you were married that he had gone to Florida and seen two people, two women, is that correct? A. Yes.

Q. When you took this deposition of Blanch Lampert, did you ever talk to her again from November 2, 1955, to November 26, 1955?

A. No, I did not. My attorneys advised me against it.

Q. And you never talked to her before November the 2nd? [22] A. No.

Q. Now, you didn't call her up and ask her to testify, to have this deposition taken? A. No.

Q. Was there anything in the deposition of Blanch Lampert that made you think that Ray Gilliland committed adultery with the two named women?

Mr. Murphey: I am going to object to that as being incompetent, irrelevant and immaterial; not the best evidence.

Mr. Hughes: If your Honor please, this woman has signed a complaint in which she charges these

(Testimony of Elsinore Machris Gilliland.)

women with adultery. The basis of that complaint is the fact that she was present when they took the deposition of this woman Blanch Lampert, and one of the——

The Court: What is the question, Mr. Reporter?

(Question read.)

The Court: Overruled. You may answer.

Q. (By Mr. Hughes): Could you answer that last question, Mrs. Gilliland?

The Court: You mean anything in the deposition itself?

Mr. Hughes: Yes, your Honor.

Q. Were you told anything? [23]

The Court: No. That isn't your question. You mean did she hear anything?

Mr. Hughes: Did you hear anything, Mrs. Gilliland?

The Court: In connection with the taking of the deposition——

Mr. Hughes: Yes, your Honor.

The Court: ——that caused her to believe that?

Mr. Hughes: Yes, your Honor.

The Court: You may answer.

The Witness: Well, I believe that Mrs. Lampert said Mr. Gilliland would go into her room, into the bedroom, in his shorts, and Mrs. Meyers would be in her slip; very much without any clothes on, with just a slip.

I bear no malice against these people, not any whatsoever.

(Testimony of Elsinore Machris Gilliland.)

Q. (By Mr. Hughes): Mrs. Gilliland, did she say anything about Faye Lyons?

A. She said Faye Lyons would come down to the apartment, or down to his house, at 3:00 or 4:00 in the afternoon, and they would drink and she would leave at 4:00 or 5:00 in the morning—while Mrs. Lampert was babysitting with her little boy.

Q. And that is what this Blanch Lampert told you? A. Yes. [24]

Q. At no time did you receive any information from anyone other than Blanch Lampert?

A. Mr. Gilliland told me that Faye Lyons had visited with him at his home in Oregon previous to our marriage. She was a guest of his in Oregon at his cabin up there.

Q. Did you have any other information other than this deposition?

A. No, just what Mr. Gilliland, my husband—

Q. Just what Mr. Gilliland said?

A. Right.

Q. And just what Mrs. Lampert told you.

A. No, he didn't say just what Mrs. Lampert told you. Mrs. Lampert said that—

The Court: I think you misunderstood the question. The question was—

If you stand behind that lectern there we can hear you better, Mr. Hughes. There is an amplifier there and it is there for a purpose.

The question is, as I understood it, did you have any other information except what you heard at

(Testimony of Elsinore Machris Gilliland.)

that deposition and what your husband told you?

The Witness: No, I did not.

Q. (By Mr. Hughes): Do you recall where you were on the 14th day of February, 1956? [25]

A. No. I may have been in Scottsdale. I do not know.

Q. Do you recall a conversation with Patti Karger, Mr. and Mrs. Kerwin, and Mr. Turbeville on that day?

Mr. Murphey: Your Honor, I object to that as being incompetent, irrelevant and immaterial; outside the issues as framed. I direct the court's attention to paragraph V (a) (3). None of those persons are named.

The Court: The pretrial conference order?

Mr. Murphey: Yes, your Honor.

The Court: What do you say to that, Mr. Hughes?

Mr. Murphey: The pretrial conference order I am referring to is in the Lyons case, page 7, paragraph V (a) (3).

Mr. Hughes: May I reframe the question, your Honor?

The Court: You may.

Q. (By Mr. Hughes): Do you recall a conversation on February 14, 1956, in the presence of Mr. Turbeville, Mr. Carpenter and Mr. Phil Kent?

A. I have never spoken to Mr. Turbeville for years. Phil Kent, I never spoke about the case. I never did to Mr. Kerwin. On my attorney's advice, we never spoke about a case.

(Testimony of Elsinore Machris Gilliland.)

Q. On May 15, 1956, at Scottsdale, Arizona, did you have a conversation with Ida Barr, Frank Kerwin, Rita Kerwin or Patti Karger?

A. No, I did not. [26]

Mr. Murphey: Just a minute. I will object to this as being incompetent, irrelevant and immaterial, unless it is directed to the subject matter which is set forth in the pretrial order. We are not getting anywhere to ask if she had a conversation unless the subject matter is identified, your Honor.

The Court: Sustained.

Mr. Hughes: If they have no conversation——

The Court: You are supposed to be cross examining this woman, I take it.

Mr. Hughes: Yes, your Honor.

The Court: Why don't you ask her leading questions and let's get on with this case. You haven't broached the subject as to what it is all about yet, that I know of. Or I have missed it because it is so long between questions. I am thinking about something else by the time you get around to the next question. Let's move this case.

Mr. Hughes: All right, your Honor.

The Court: Isn't it a fact that you said so and so in the presence of so and so at such and such a time? Let's move on. If that is what you are driving at.

Mr. Hughes: Yes, your Honor.

Q. Isn't it a fact that you said, "Ray shackled

(Testimony of Elsinore Machris Gilliland.)

up with Faye Lyons" on February 14, 1956, in the presence of Mr. Carpenter? [27]

A. No, I never said. I didn't even know what "shacked up" meant. I never heard that expression in my life until I read it in their complaint.

Q. Isn't it a fact that you said on May 15th at Scottsdale, Arizona, in the presence of the Kerwins, Karger and Barr that "Ray shacked up with Faye Lyons"? A. No.

Q. Isn't it a fact that on March 26, 1956, at Phoenix, Arizona, in the presence of Ida Barr you said, "Ray shacked up with Faye Lyons"?

A. No.

Q. It isn't it a fact that on December 20th or 21st, 1955, at the Mission Inn in Riverside, California, you said that, "Ray is being punished for sleeping with that Meyers person"?

A. No. I did not even know the Meyers person. I never even heard the name.

Q. Isn't it a fact that you said this too, in substance, in regard to the Lyons person?

A. No. I never heard their names.

Q. Isn't it a fact, Mrs. Gilliland, that you had no information other than the information given to you by Blanch Lampert when you accused these women in the complaint filed for divorce?

A. That's right, with the exception—— [28]

Mr. Murphey: Objection.

The Court: Just a moment. Let the witness answer.

Mr. Murphey: All right.

(Testimony of Elsinore Machris Gilliland.)

The Witness: With the exception of the neighbors in Scottsdale. All of the neighbors told me about women playing around the yard.

The Court: Do you want to include your husband, also, what he told you?

The Witness: He told me that he had Miss Faye Lyons up at his ranch in Oregon. And then, also, I saw a picture of he and Miss Meyers on a tree in my yard in Scottsdale. They had been in my pool. That is all I ever saw.

Q. (By Mr. Hughes): You saw a picture of——

A. A photograph, a camera snapshot of Mrs. Meyers and my husband.

Q. Where was that?

A. In his scrapbook in Scottsdale.

Q. When did you see that?

A. The last time I was down there.

Q. When was that?

A. That was last—the spring—well, just before he died. We had become reconciled the day after our divorce.

The Court: When did he die? [29]

The Witness: He died January 30th, I believe, 1956.

Q. (By Mr. Hughes): Isn't it a fact that he died January 30, 1957?

A. '57, was it? I don't know dates. '57.

Q. Isn't it a fact that you had a final decree—you had an interlocutory decree of divorce in the matter of Elsinore Gilliland vs. George Chester

(Testimony of Elsinore Machris Gilliland.)

Ray Gilliland, No. 62839 in the County of Riverside?

A. He tried to divorce me, but the judge gave me the divorce—the interlocutory. But I made up with him the day after. He called me up and begged me to come down to Scottsdale.

Q. You made up with him the day after the divorce?

A. Right. I went down to Scottsdale and we became reconciled. And we were reconciled until the time he died.

Q. You were reconciled with him until the time—— A. Right.

Q. *When* did you reside then from June 13, 1956, to January 30, 1957?

A. I lived both in Palm Springs and Scottsdale.

Q. Isn't it a fact that Ray Gilliland resided in Scottsdale, Arizona, from June 13, 1956, to January 30, 1957? A. Yes, sir.

Q. And that he lived separate and apart from you? [30] A. Yes, sir.

Q. Upon what fact do you base this reconciliation?

Mr. Murphey: I object as being incompetent, irrelevant and immaterial.

The Court: Are we going to try the Gilliland divorce case, too?

Mr. Hughes: No, your Honor.

The Court: What possible——

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: I withdraw the question, your Honor.

Q. Isn't it a fact that you never served Faye Lyons and Ann Meyers in the divorce proceedings No. 62839 in Riverside?

A. I don't understand.

Q. You never served service of process on Faye Lyons or Ann Meyers?

The Court: Hasn't that been covered up to now by a stipulation, gentlemen?

Mr. Hughes: Well, it has in some respects.

The Court: Can it be covered by stipulation?

Mr. Hughes: I would like to inquire——

The Court: Were the *correspondence* served in the divorce action?

Mr. Murphey: They were not served, after a diligent search for them.

The Court: All right. Do you accept the stipulation? [31]

Mr. Hughes: I accept the stipulation that they were not served.

The Court: Very well.

Q. (By Mr. Hughes): What diligence, if any, did you use in endeavoring to serve the named correspondence?

The Court: That means did you try to serve them?

The Witness: I do not know whether my attorneys did or not.

Q. (By Mr. Hughes): You yourself did nothing?
A. No.

(Testimony of Elsinore Machris Gilliland.)

Q. What, if anything, did you do with your second cause of action pled in that divorce complaint?

Mr. Murphey: I am willing to offer a stipulation, if you don't consider it an unfair interruption, that it is still pending in Riverside County. Nothing has been done with it.

The Court: Do you accept the stipulation?

Mr. Hughes: Yes, your Honor.

Q. What, if anything, did you do with the first cause of action?

Mr. Murphey: Another stipulation: She obtained the interlocutory decree on the first cause of action—mental cruelty. [32]

The Court: Do you accept the stipulation?

Mr. Hughes: Yes, your Honor.

Q. When did you see this picture of Ann Meyers and Ray Gilliland?

A. Last January just before he died. He showed me his scrapbook and told me it was Ann Meyers.

Q. Were you interviewed by the press?

A. No.

Mr. Murphey: Just a minute, please.

The Court: It is answered.

Mr. Murphey: It is so fast, your Honor, I can't possibly get an objection in.

Q. (By Mr. Hughes): Did you read the Daily Enterprise News of Riverside County on March 23, 1956? A. I believe I did.

Mr. Murphey: I am willing to offer a stipulation at this time, in the interest of time, that the

(Testimony of Elsinore Machris Gilliland.)

document which counsel has shown me is the first page of the issue of the Riverside Enterprise for the date of March 23, 1956.

The Court: Do you accept the stipulation?

Mr. Hughes: Yes, your Honor.

The Court: Do you offer it in evidence?

Mr. Hughes: Yes, your Honor. [33]

The Court: It will be received in evidence as Exhibit 4 in the Lyons case and Exhibit 3 in the Meyers case.

(The page referred to was marked Plaintiff Lyons' Exhibit 4 and Plaintiff Meyers' Exhibit 3, and was received in evidence.)

Q. (By Mr. Hughes): Do you subscribe to the Riverside Daily Enterprise? A. I do not.

Q. Did you see it on the newsstand?

A. I went and bought one.

Q. Off the newsstand?

A. I believe so.

Q. Did you ever talk to a reporter from the Riverside Daily Enterprise?

A. I said "Good morning."

Mr. Murphey: Just a moment, please. May I ask the court to request the witness to refrain from answering so fast? It is impossible to interject objections.

The Court: You heard what your counsel said.

Mr. Murphey: I object to the question as incompetent, irrelevant and immaterial, and no time stated before or after this alleged publication.

The Court: Isn't the answer in?

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphey: I move to strike it for the purpose.

The Court: What was the answer?

(Answer read.) [34]

The Court: Do you wish to strike that?

Mr. Murphey: No, your Honor. I couldn't hear it over my objection.

The Court: Let's proceed, Mr. Hughes.

Q. (By Mr. Hughes): You never talked to any of them then? A. No, sir.

Mr. Murphey: Now, just a minute.

The Court: Do you mean at any time in her life?

Mr. Hughes: No, your Honor.

The Court: Well, why don't you be specific in your questions?

Q. (By Mr. Hughes): Did you ever talk to any reporter in regard to the March 23rd publication of the Riverside Daily Enterprise?

Mr. Murphey: You mean before, counsel?

Mr. Hughes: Before.

The Court: Before it was published?

Mr. Hughes: Yes, your Honor.

The Witness: No, sir.

The Court: Your answer?

The Witness: No, sir.

Q. (By Mr. Hughes): Were you ever interviewed by a reporter in regard to this cause of action you had pending for a divorce? [35]

Mr. Murphey: Just a moment. I object to that as being incompetent, irrelevant and immaterial,

(Testimony of Elsinore Machris Gilliland.)

and outside of any issue in this case. The third cause of action deals specifically with this publication.

The Court: Sustained.

If you want to be more specific in your question, I will allow it.

Q. (By Mr. Hughes): Isn't it true that you sought publicity in regard to your divorce action?

Mr. Murphey: Just a moment. The same objection, if the court please.

The Court: Overruled. You may answer. Newspaper publicity?

Mr. Hughes: Newspaper publicity.

The Witness: What was the question?

Q. (By Mr. Hughes): Isn't it true that you sought newspaper publicity in regard to your divorce action?

A. No, sir. I never sought any newspaper publicity.

Q. Isn't it true that you thought your public must be kept informed?

Mr. Murphey: Now, just a moment. I object to that as being incompetent, irrelevant and immaterial.

The Court: Do you mean whether she thought it or said it? [36]

Mr. Hughes: Said it, your Honor.

The Court: Why don't you ask her? What are you trying to do, lay the foundation for impeachment?

Mr. Hughes: Yes, your Honor.

(Testimony of Elsinore Machris Gilliland.)

The Court: Very well. If you amend the question, it will be allowed.

Mr. Anson: Your Honor, could I point out that in the pretrial conference order on the third cause of action, on page 8, the first issue is did the defendant cause this publication to be made, and only in the event that is established are these corollary issues as to whether she sought publicity and sought interviews to be reached in this case?

The Court: This is cross examination of the witness, I take it, and counsel states that he is attempting to lay a foundation for impeachment. So that would be admissible.

Was the question answered?

Mr. Hughes: Isn't it true that——

Mr. Reporter, will you read the question?

The Court: I think you better reframe it. I think you have asked her two or three questions about the question since then.

Q. (By Mr. Hughes): Isn't it true that—— [37]

The Court: On or about a certain time you said to so and so—is that it?

Mr. Hughes: Yes.

Q. ——on or about April 15, 1955, you stated that your "public must be kept informed"?

The Court: Stated to whom?

Q. (By Mr. Hughes): You stated in a deposition in action No. 82973 that your "public must be kept informed"?

The Witness: Shall I answer?

The Court: Yes.

(Testimony of Elsinore Machris Gilliland.)

The Witness: All right. I probably stated that my public wanted a clean report on me. My public is—I do a great deal of charity work, and I want no scandals. And when the deposition was taken it was taken in Riverside by Mr. Philip Barnett, and that was the only time I ever said it, and it was done facetiously.

Q. (By Mr. Hughes): Isn't it true that the first thing you do in a case of any out-of-order event in your life is call the press?

Mr. Murphey: I object to that as being incompetent, irrelevant and immaterial; outside of any issues in this case.

The Court: Overruled. You may answer.

The Witness: No, I do not call the press. I happen to be a member of all the press clubs in America, an honorary member. The press try to consult me, but I do not call the press. [38] And I do not give any information to the press, on my counsel's advice.

Q. (By Mr. Hughes): How long have you belonged to all the press clubs in America?

A. Not all of them in America. I am an honorary member of the Los Angeles Press Club, the Palm Springs Press Club. I belong to the Phoenix Press Club. Naturally, I have entree to all the press clubs in America.

Q. Isn't it true that you stated that you would give your life story to Confidential?

Mr. Murphey: Just a minute. I object to that as being incompetent, irrelevant and immaterial.

(Testimony of Elsinore Machris Gilliland.)

The Court: Do you wish to be more specific and say when and where, or give the witness any indication of what you have in mind? Or do you mean to ask her if she said that at any time, any place, under any circumstance?

Q. (By Mr. Hughes): Did you say that in regard to your divorce action? A. No.

Q. Did you ever state that you were going to give your story to Confidential? A. No.

Mr. Murphey: Just a moment. [39]

Q. (By Mr. Hughes): Isn't it true that you were in the dining room of the Phil Kent house on or about May 1, 1955, when Mr. Gilliland and Mr. and Mrs. Kent and Mr. and Mrs. Raleigh and their daughter and Faye Lyons were present?

Mr. Murphey: Just a moment. I object to that as being incompetent, irrelevant and immaterial, and having no bearing on any issue in this case; outside of any date named in the pretrial order, and there is no allegation that she is claimed to have made any derogatory statement concerning these women on that date.

Mr. Hughes: She has testified, your Honor, that she never knew these people, and I wish to introduce the fact that she did know them as well at the time that she made the various statements alleged in the complaint.

The Court: Which people are you speaking of?

Mr. Hughes: Faye Lyons——

The Court: She never knew the plaintiffs?

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: She claims she never knew the plaintiffs.

The Court: At what time? She said she didn't know the names of these women who allegedly had been at her husband's place. But be more specific about the time. I don't recall that she said she never knew who these people were, these women were at any time. [40]

Q. (By Mr. Hughes): Did you ever know the woman Faye Lyons or Ann Meyers prior to November 26, 1955?

A. No. I don't even know them now.

Q. Isn't it true that you were in the dining room of the Phil Kent home in Scottsdale, Arizona, when present were Mr. and Mrs. Kent, Ray Gilliland, Mr. and Mrs. Raleigh and their daughter, and Faye Lyons?

A. I do not remember who was there. They were all sitting down and having dinner. I saw Ray's car out in front and I went in to call on the Kents.

Q. And they were all sitting there having dinner when you came in?

A. And then they all got up and walked out because I came in.

Q. Was this on or about May 1, 1955?

A. I cannot remember the date. It was on a Sunday evening.

Q. Isn't it true that Mr. Gilliland was sick and had had his illness diagnosed as cancer of the throat in January 1955?

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphy: Just a moment. I object to that as being incompetent, irrelevant and immaterial.

The Court: What does it have to do with the case?

Mr. Hughes: I am building up to this, your Honor, [41] that she knew of this illness and she knew of these other factors.

The Court: Well, Mr. Hughes, it would be a great deal easier if you would prove your case in an orderly fashion. You are trying to show some malice here before you have ever offered any evidence that anything was ever said, except the divorce complaint.

The objection is overruled. You may answer.

You mean, does she know that?

Mr. Hughes: Yes, your Honor.

The Court: That is what you want to show, I take it, not that it was true, but that that was her understanding.

The Witness: In January '55, was that the year that Ray went to the hospital for the first time?

Q. (By Mr. Hughes): Yes, Mrs. Gilliland.

A. Well, I thought he had cancer. We couldn't tell him he had cancer. He wouldn't have believed us. I did not see Mr. Gilliland for months. I don't believe I saw Mr. Gilliland for eight or nine months after that, until the fall—after his first operation.

Q. I am speaking of prior to the operation, Mrs. Gilliland.

A. Prior to the operation? I sent him to a [42] hospital in Truckee and we had X-rays taken and

(Testimony of Elsinore Machris Gilliland.)

they thought they showed some spots, and they thought it was cancer. And they said, "Hurry him in to Los Angeles."

I called up five eminent physicians and surgeons for consultations, and he wouldn't have them. He said, "The goddam Jews. I will not have them."

So he went to some quacks and it pacified him. That is all I know. So I didn't know who was right, whether the surgeons, or his X-rays showed up correctly, or not. I was not sure.

Q. Did Mr. Gilliland drink quite a bit of whisky?

A. Yes, he did consume a great deal of whisky.

Q. Did he get drunk about every night?

Mr. Murphey: Now, just a moment. I object to that as being incompetent, irrelevant and immaterial.

The Court: What does it have to do with it?

Mr. Hughes: The question here is whether or not she had reason to believe whether he was capable of committing an act of adultery. Under Civil Code Section 47, subsection (2), State of California——

The Court: Is it your position that a man that is drunk cannot commit adultery?

Mr. Hughes: No, your Honor, it isn't. But when you take all the factors and put them together, he cannot.

The Court: You mean it is hardly likely. [43]
Overruled.

Did he get drunk nearly every night?

(Testimony of Elsinore Machris Gilliland.)

The Witness: No, not every night. He was periodical. He would drink and then he wouldn't drink.

The Court: Was he what you would call an alcoholic?

The Witness: Not exactly, no.

The Court: Just a heavy drinker?

The Witness: Just a heavy drinker.

Q. (By Mr. Hughes): To your knowledge, was he a heavy drinker for a long period of years?

A. I do not know. I did not know him for a good many years.

The Court: During all the time you knew him was he a heavy drinker?

The Witness: Quite heavy, yes.

The Court: How long did you know him?

The Witness: Well, I met him in '32, but we never were very great friends.

The Court: Your next question, Mr. Hughes?

Q. (By Mr. Hughes): Mrs. Gilliland, did you ever have an act of sexual intercourse with Ray C. Gilliland?

Mr. Murphey: Just a minute. I object to that as being incompetent, irrelevant and immaterial.

Mr. Hughes: I will reframe the question, your Honor.

Q. Isn't it true, Mrs. Gilliland, you were married May 3, 1954, and that you had an interlocutory decree of divorce granted you June 13, 1956, and in the intervening time you never had an act of sexual intercourse with Ray C. Gilliland?

Mr. Murphey: I object to that as being incom-

(Testimony of Elsinore Machris Gilliland.)

petent, irrelevant and immaterial, outside of any issue in this case.

The Court: Of course, if there had been evidence here it might be very good on rebuttal, if there was evidence claiming this was true. But all that is before the court now is the allegation of the cross complaint. Is that correct?

Mr. Hughes: Yes, your Honor.

The Court: As far as any claim of libel is concerned. Now, if you rested on that and the defense offered to prove that it was true, then in rebuttal it might be competent for you to show that he was incapable of it. And that is the purpose of the question, isn't it?

Mr. Hughes: Yes, sir.

The Court: I will sustain the objection at this time.

Is there anything further from this witness?

Mr. Hughes: I don't believe I have anything further of this witness, your Honor.

The Court: Anything further at this time?

Mr. Murphy: May I reserve my questions, because we will call her at a later date?

The Court: Very well. You may step down.

* * * * *

FAY LYONS

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Fay Lyons.

The Clerk: How do you spell your last name?

(Testimony of Fay Lyons.)

The Witness: L-y-o-n-s.

Mr. Murphey: If the court please, may I make an observation that this lady is not named as any witness having heard Mrs. Gilliland make any of the alleged oral statements; nor is she alleged to have any direct information [46] of any interview with the Riverside Enterprise. And I can only assume that she is going to testify concerning damages which may have resulted to her. And in the interest of orderly procedure I think it might be well for Mr. Hughes to establish his direct evidence of the acts before we go into the element of damages.

The Court: Is this lady one of the plaintiffs?

Mr. Hughes: Yes, your Honor.

The Court: I notice the name is spelled in the caption F-a-y-e.

Mr. Hughes: Yes, your Honor.

The Court: Do you wish to amend the pleadings?

Mr. Hughes: Yes, I do, your Honor. I wish to amend the pleadings to spell her name F-a-y.

The Court: The pleadings in complaint and pre-trial conference order and all proceedings will be so amended.

Mr. Murphey: Did the court rule on my suggestion?

The Court: I am waiting to hear from Mr. Hughes.

Mr. Hughes: If your Honor please, the plaintiff here, subject to orderly process, can testify as to when she first heard of these things, what she did,

(Testimony of Fay Lyons.)

if anything, about them, and her relationship, if any, with Ray C. Gilliland; that the gravamen of this action is the truth of these statements——

The Court : Is this offered on the second cause of action? [47]

Mr. Hughes: This is offered, your Honor, not only on the first cause of action but also on the second cause of action.

The Court: When do you expect to present evidence as to the first cause of action?

Mr. Hughes: I have some witnesses coming, your Honor. They are supposed to be here from Arizona, but I haven't been able to get hold of them.

The Court: Very well. You may proceed.

Direct Examination

Q. (By Mr. Hughes): Will you state your name, please? A. Fay Lyons.

Q. And you are the plaintiff in this action against Elsinore C. Machris Gilliland?

A. Yes.

Q. Were you acquainted with Ray C. Gilliland?

A. Yes.

Q. When did you first become acquainted with him? A. In 1937.

Q. Did you ever visit at his ranch in Oregon?

A. I did for one day with six or eight other people. I arrived there and returned alone the next day to Reno, where I was then living. [48]

Q. And that was in 1937? A. Yes.

(Testimony of Fay Lyons.)

Q. Did you see Mr. Gilliland in January 1954?

A. Yes, the first meeting after 13 or 14 years.

Q. Where was this? A. In Miami.

Q. Were you employed in Miami at that time?

A. Yes.

Q. What were you doing?

The Court: Miami, Florida?

The Witness: Yes, your Honor.

Q. (By Mr. Hughes): What were you doing?

A. I was employed at the L'Aiglon, which is a very nice restaurant, supper club.

What was I doing there? I don't understand the question.

Q. Were you hostess in the L'Aiglon restaurant?

A. Yes, partly.

Q. And reservation clerk? A. Yes, sir.

Q. And you also owned a concession there, is that right? A. Yes.

Q. Did you see Mr. Gilliland again in the year 1954? [49] A. No.

Q. When did you see him again?

A. In 1955.

Q. And when was that?

A. I believe the very early part of the year, January or February; soon after the New Year.

Q. Did you see him after January 1955?

A. Yes, in April.

Q. And where was that?

A. In Scottsdale, Arizona.

Q. Were you in Scottsdale, Arizona?

A. Yes.

(Testimony of Fay Lyons.)

Q. How did you come to be in Scottsdale, Arizona?

A. I made a trip to Scottsdale, Arizona for the purpose of looking at the development of the area with the thought of going into business there, either restaurant or motel business, and moving my family, my mother and son and I there, possibly.

Q. Did you see Mr. Gilliland in Scottsdale?

A. Yes.

Q. Where did you stay when you were in Scottsdale in April or the first of May, 1955?

A. At the Paradise Valley Guest Ranch.

Q. To your knowledge where did Mr. Gilliland stay? A. In his home there. [50]

Q. On 71st Place? A. Yes.

Q. But not in the home of Mrs. Gilliland?

A. No, not to my knowledge.

Q. Did you meet Mrs. Gilliland while you were in Scottsdale? A. Yes.

Q. Where did you meet her?

A. At Mr. and Mrs. Kent's home.

Q. Was this a dinner party given by the Kents?

A. Yes, it was.

Q. During the time that you were in Scottsdale in April and May of 1955—what were the approximate dates of that time?

A. I think that I arrived there about the 23rd or 24th of April, and stayed for one week—either seven or eight days, rather. And then I returned home to Miami.

(Testimony of Fay Lyons.)

Q. During that time did Mr. Gilliland have guests in his house?

A. Just about constantly. I would say almost all the time every day.

Q. And who were the guests?

A. There were very many. Mr. and Mrs. Kerwin, Clyde Williams, Judge Fam and Mrs. Blake of Los Angeles, California. A Mr. Cliff Carpenter. Mr. Turbeville. Mr. and Mrs. Kent.

Q. Some of those guests stay in the house overnight?

A. Many of them did. Most of those people I mentioned, with the exception of the local people, Mr. Carpenter, Mr. Turbeville. When I arrived Judge and Mrs. Blake were house guests then. I met them the first day after I arrived.

Q. When did you leave Scottsdale on that trip?

A. I think that it was about May 2nd. It could have been the first of May. First or second.

Q. Did anyone accompany you when you left?

A. Yes. Mr. Gilliland. I had tried—I realized that I had to get home immediately. Dad was not well. He died the next month as a result of his——

Mr. Murphey: I am sorry, but I can't hear the witness.

The Court: Do you wish the answer read?

Mr. Murphey: Yes, I do, your Honor.

The Court: Please read it, Mr. Reporter.

(Answer read.)

Mr. Murphey: I move to strike the answer insofar as "I realized," as nonresponsive, and incom-

(Testimony of Fay Lyons.)

petent, irrelevant and immaterial to any issue in this case.

The Court: On the ground of immateriality, why, it will be stricken. [52]

Q. (By Mr. Hughes): Was anyone else with you on this trip besides Mr. Gilliland?

A. Mr. Clyde Williams part of the way.

Q. And how did you make the trip?

A. By automobile. We had to. Mr. Williams and Mr. Gilliland, the purpose of their trip was for them to look at some oil properties, and they offered to drive me to Ft. Worth, Texas, since I was unable to get a plane reservation out of Phoenix for Miami.

The suggestion was that I drive along with them to Ft. Worth where they were going, and I might have an easier time getting an airplane ticket from there, Ft. Worth, to Miami.

Mr. Gilliland and Mr. Williams did look at this one particular oil property on the way to Ft. Worth. I found it most interesting. And I think we took—

Mr. Murphey: Your Honor, I move to strike the portion of the answer that they did inspect oil property as having no bearing on any issue in this case. It's immaterial.

The Court: The motion is denied.

The Witness: Well, I am——

Mr. Murphey: May she answer questions, please, so I can interpose objections?

The Court: If she gives any portion of her

(Testimony of Fay Lyons.)

answer which you deem incompetent, irrelevant or immaterial, you [53] may move to strike that.

Q. (By Mr. Hughes): After you left Phoenix, can you tell me where, if any place, you stayed overnight?

A. I don't remember staying anywhere. I think we drove through.

Q. Did you visit the home of Clyde Williams and Judge Williams in Knoxville, Texas?

A. Yes.

Q. Did you stay there?

A. Yes. We stayed there for a few hours. We were—Clyde was rushing Ray to see this property. He kept saying that the time was of the essence, or he would lose the option on it. I mean, we didn't stay only but a few hours.

Q. You drove straight from Scottsdale to Knoxville, Texas?

A. I believe so. I think so.

Q. You don't recall staying anywhere?

A. I don't recall staying anywhere.

Q. After your visit in the afternoon at Clyde Williams' and Judge Williams' homes in Knoxville, Texas, did you go to Ft. Worth then?

A. It's Knox City.

Yes, then we went to Ft. Worth; stopping on the way.

Q. That is Knox City, Texas? [54]

A. Yes.

Q. And in Ft. Worth do you recall where you stayed, if any place?

(Testimony of Fay Lyons.)

A. The Hilton Hotel. It was, I think, in Ft. Worth.

Q. Did Mr. Gilliland and Mr. Williams conduct any business during the time you were in Ft. Worth?

A. Yes, they did. They would leave the hotel in the morning—we were there two days, I think—and they would be gone for several hours conducting business. They had meetings with one or two gentlemen there, I think, in reference to oil properties.

Q. Did all three of you have separate rooms in this hotel? A. Yes.

Q. Did you then go on to Miami, Florida?

A. Yes.

Q. And similar accommodations and such were used on your way to Miami, Florida?

A. Yes.

The Court: You mean by automobile?

Mr. Hughes: Yes, your Honor.

Q. (By Mr. Hughes): Was that by automobile, Mrs. Lyons? A. Yes.

Q. When was the approximate date that you arrived in [55] Miami, Florida?

A. I think that it was the evening—the day before Mother's Day, which I recall—I mean, I have that association. So that it probably was about the 9th or 10th of May, 1955.

Q. Did you then see Mr. Gilliland after you arrived in Miami, Florida?

A. We saw him the day we arrived. And he

(Testimony of Fay Lyons.)

came over—he dropped me off, visited with my family, and then left.

The next day he telephoned to say that he had to get back to Scottsdale, Arizona, and that he would drive by to say good-bye to us. Which he did. He visited the next day, and then left, he said, for the West—Arizona, I believe.

Q. Did you go again to Scottsdale, Arizona?

A. Yes.

Q. When was that?

A. Early in June, just after school closed. I took my son. I believe the 3rd of June, on or about the 3rd.

Q. How old was your son?

A. Six years old.

Q. And you took him with you? A. Yes.

Q. And what was the date of your arrival in Scottsdale, if you remember? [56]

A. I think June 3rd, 3rd or 4th.

Q. And where did you stay?

A. At the Paradise Valley Guest Ranch, the same place.

Q. What were your accommodations there?

A. We had a bedroom, living room, kitchen, breakfast room and bath.

Q. And who occupied the bedroom at the Paradise Valley Guest Ranch?

A. My son and I.

Q. Did you and Mr. Gilliland have any business during this period?

A. Yes. That was the purpose of the trip.

(Testimony of Fay Lyons.)

Q. What was the business?

A. During the first trip the business was interrupted, and so I came back later to complete it. I had seen several properties, several motels with Mr. Carpenter and Mr. Trubeville, who are in the real estate business. They had shown us some. We had met with an architect and gone over blueprints. That was for a restaurant which was being thought of, too, at the time.

And then I received a call—this was, of course, during the first trip—that my dad was ill and suffered a stroke. And at the same time Mr. Gilliland had been receiving telephone calls from Mr. Williams urging him to hurry and [57] meet him in Texas to see these oil properties or the wonderful opportunities, he thought, would be lost. So that that was the reason that I left and the reason that he left Scottsdale at that time, after my first trip or journey. My first trip.

Now, then, when I arrived home Dad was much, much better and he said, "Why don't you—I am fine, now. I am perfectly all right, and certainly well enough for you to return and finish what you had started in Arizona."

So that it was because of that that I was able to return. And, oh, probably ten days after I had arrived there I went back and did continue the pursuit of looking at motels again with Mr. Carpenter and Mr. Turbeville. And Mr. Kerwin and Mrs. Kerwin who were with us. And Mr. Gilliland. And so that I did continue.

(Testimony of Fay Lyons.)

Q. Now, Mr. Carpenter is a real estate man in Scottsdale, Arizona? A. Yes.

Q. And Mr. Turbeville was engaged in real estate business and around Phoenix, Arizona?

A. Yes.

Q. Did you see Mr. Gilliland every day during the time that you were there on the second trip?

A. No. He was out of town a good deal. And he was in town several days when I didn't see him, one reason [58] or another. And then after I arrived the second time, I decided to visit some friends in Los Angeles. And I took my son and a lady that I met there who was the babysitter for my child during both trips, the first and second, Alice Posky, I think her name was. And so Alice and Daniel, my son, and I drove from Scottsdale to Westwood and——

Mr. Murphey: Now, just a moment. I think the question has been answered as to whether she saw Mr. Gilliland. Also, this is incompetent, irrelevant and immaterial to any issue in this case.

The Court: Put your next question.

Q. (By Mr. Hughes): How long were you in Los Angeles?

A. We spent several days, five or six, I think, in Westwood. I had no idea where Mr. Gilliland was. He had left a few days before we left. And, well, that isn't—I guess I am speaking too much.

Q. Did you ever stay overnight in his house?

A. No.

(Testimony of Fay Lyons.)

Q. Was Mrs. Lampert at the house during the time you were there?

A. Mrs. Lampert worked for Walter Winchell. She told me—her husband told me. That was the understanding. They worked from early morning, I think, went for breakfast, [59] to serve Mrs. Winchell. I believe Blanche told me she didn't come to Mr. Gilliland's house until between 4:00 and 5:00 in the afternoon. Mr. Gilliland let them occupy a room that was not really connected with the house. It was—I think there was a carport in between. This is where they lived. I didn't get the feeling she was a housekeeper whatever. She cooked, I believe, once or twice while I was there. Mr. Gilliland cooked the time I was there, and Judge Blake and the others.

Mr. Murphey: May we have another question? This is incompetent, irrelevant and immaterial to any issue in this case.

The Court: Put your next question.

Q. (By Mr. Hughes): Was Mrs. Lampert in and out of the house at all times that she was there?

A. Oh, no. No.

Q. She had free access to the use of the kitchen?

A. Yes. For hers and her husband's food they had their separate little Frigidaire, yes.

Q. Did they stay in the kitchen and in the living room of the house?

A. No. They did in the kitchen. They would come, and Mrs. Lampert would fix something, some dinner for her husband.

(Testimony of Fay Lyons.)

The routine that I observed was that she would come about 4:30, give or take a half hour, and have her beer. She would go to the Frigidaire and take out—it was fascinating to me because I had never seen anybody literally—I am not exaggerating, line up——

Mr. Murphey: This is incompetent, irrelevant and immaterial, having no bearing on any issue in this case. I think we can get to some relevant question.

The Court: Put your next question.

Q. (By Mr. Hughes): After you came back from California—was that July 1955?

A. It could have been. I think it was the end of June when I came back from California.

Q. How long did you stay in Scottsdale after that?

A. Maybe ten days. But I can remember the date I left there. And it seems to me that I came back——

Q. Was Mr. Gilliland there during that ten days?

A. He was later. He wasn't there when we arrived. I brought a friend of mine back with me, and I remember we all discussing that we didn't know where Ray was.

Q. What was the name of your friend?

A. Beatrice Nemer Schor.

Q. Where did she stay?

A. She stayed in my apartment with my son and me.

(Testimony of Fay Lyons.)

Q. The three of you stayed in the apartment?

A. Yes. She stayed about a week. [61]

Q. Then you left and went back to Miami?

A. Yes.

Q. And in all this period of time you resided in Miami, Florida?

A. Oh, yes.

Q. From January 1954 through January 1956?

A. Yes.

The Court: Do you still reside there?

The Witness: Yes, your Honor.

Q. (By Mr. Hughes): Where did you first hear of the charges that you claimed in your complaint?

A. It was in L'Aiglon, where I worked. And one of our patrons said, "What is——"

The Court: Your next question.

Mr. Hughes, keep up with the witness, and we will get along better.

Q. (By Mr. Hughes): What was said by the patron?

Mr. Murphey: Just a minute. There has been no foundation laid.

Q. (By Mr. Hughes): Where is L'Aiglon?

A. It is in Miami.

Q. And what is it?

A. It is a very, very exclusive place for dining and for people meeting. There is no entertainment.

Q. What was the approximate date, if you can recall, [62] when you first heard of the accusations that were set forth in this matter?

(Testimony of Fay Lyons.)

A. I think it was in January. It seemed to me it was just shortly after the holidays, New Year's, in 1956. It may have been some weeks before or later.

Q. And how did you happen to hear of these accusations?

Mr. Murphey: Just a moment. What do you mean by "accusations"? I object to that as being incompetent, irrelevant and immaterial. We are talking about——

The Court: There are three causes of action here. Now, which one are you referring to?

Q. (By Mr. Hughes): How did you happen to hear of the matter set forth in your first cause of action?

A. People. Patrons. Mr. and Mrs. Young called ——

Q. Who are Mr. and Mrs. Young?

A. The proprietor of L'Aiglon at that time.

Q. How did you hear of the matters set forth in your second cause of action, which is the divorce complaint?

A. I received a letter with the clipping enclosed, a clipping which appeared in the Riverside newspaper from my friend who has lived here for many years. She sent it to me with a note asking me what this meant.

Mr. Murphey: I move to strike that as being incompetent, irrelevant and immaterial, hearsay, not the [63] best evidence—the content of any letter.

(Testimony of Fay Lyons.)

The Court: Motion denied. Proceed.

Q. (By Mr. Hughes): When did you first hear of the contents of the divorce complaint in the cross-complaint for divorce? When did you first hear about that?

A. In March. I think it was in the spring, March, or could have been early April in 1956.

Q. What action, if any, did you take in regard to this?

A. My first reaction was——

Q. What action did you take?

A. Before I contacted you?

Q. Yes.

A. I didn't take any action at first. I didn't know that there was anything that I could do. And I also recall that Mr. and Mrs. Gilliland had had so many litigation suits being brought and then dropped, and then continuing on this way, that it occurred to me that very likely this one would be dropped, too. And it happened during the busiest time of my career, and so I wasn't free to come to California or see about it. And I really didn't know there was anything I could do at that point. And I didn't think they would go into a divorce. I thought this suit would be dropped as so many, many others had been before.

Q. What effect did the matters set forth in the cross-complaint of divorce have on you?

A. It made me very, very nervous. Humiliation. The total disgrace of—the shock of suddenly being branded an adultress, a person unfit—it was——

(Testimony of Fay Lyons.)

Q. Were you under the care of a doctor?

A. I was under the care of a doctor. I had developed from nerve pressure—it was nerves and muscular pressure that settled in the head, the back of the neck, and spread until it paralyzed my right arm, which could not be used for many months. I couldn't hold my head up for more than ten minutes at one time. And then it was a collar, and later a towel that I used to pin very tightly around in order to keep erect for more than a few minutes at a time. I was under treatment for six——

Q. What effect did this have on your employment with the Youngs?

A. Mr. Young called me aside and said, "What are we going to do about this?"

And I said, "It will all be—I am sure it will be clarified, Mr. Young. It will take a little time."

My sister was planning marriage. She is a school teacher in the public school system in Dade County. She was going with a young man and they had plans for marriage. And she came to me one day—of course, at the time we were all living together and she was at home. She came home [65] one day and said that in school she had heard my name mentioned in this connection.

Mr. Murphey: Just a minute. I interpose an objection and move to strike the last statement concerning her sister.

The Court: Motion granted.

Mr. Hughes: If your Honor please, an element of damage in a slander or libel action——

(Testimony of Fay Lyons.)

The Court: It can't be proved by saying that somebody else said that they heard it.

The Witness: No.

The Court: Your question to the witness did not call for that.

Put your next question.

Q. (By Mr. Hughes): Was your family upset over this matter?

The Court: The question was, what happened to Young and her employment, as I take it, in Miami, Florida.

Did anything happen? I haven't heard the answer.

Q. (By Mr. Hughes): Are you still with the Youngs in Miami, Florida?

A. Yes. Pending the outcome of this, the final result of it, at least, anyway. They are that fair.

Q. What effect did this have on your family?

Mr. Murphey: Just a moment. Incompetent, irrelevant and immaterial.

Mr. Hughes: It is incompetent, irrelevant and immaterial, your Honor, if I try to insert that as an element of damage. But if I use the effect of her family and how that affected her——

The Court: Then why don't you just ask her. You have asked her how these things affected her and she said that she had been very ill, as I understand the testimony. You can ask her what happened to her, if you want to; not how it affected members of her family. That is immaterial. It is how it affected her that is material.

(Testimony of Fay Lyons.)

The Witness: I became more and more affected. There were so many, many reasons for this. To begin with my Mother's health hadn't been well. And as a result of this disgrace she became actually very, very ill. Her illness made me more upset.

Mr. Murphey: Just a moment. I move to strike the state of health of the mother as having no bearing on any issue in this case.

The Court: The motion is granted.

Your next question?

Q. (By Mr. Hughes): Did you attend the Lindsay Hopkins Vocational School?

A. Yes.

Q. From what date to what date? [67]

A. I returned from the second trip—

Q. What dates did you attend the school?

A. From August twenty something through October 29th, I believe.

Q. Would August 29, 1955 through October 23, 1955 refresh your memory? A. Yes.

Q. Were you ever absent from the school during that time? A. No.

Q. What was your course of study at that time?

A. Hotel cashiering operation.

Q. Why did you take a course in hotel cashiering?

Mr. Murphey: I object to that as being incompetent, irrelevant and immaterial.

The Court: Overruled.

The Witness: That was my plan before my first trip to Scottsdale. I thought I would go there and see the country, and then with the purpose of going

(Testimony of Fay Lyons.)

into a hotel, investing in a hotel or maybe restaurant, or maybe both, and then return to Miami and take this course at the Lindsay Hopkins School, and that is what I did.

Q. (By Mr. Hughes): This was part of your plan, then, in regard to inspecting motel properties and hotel properties and restaurant properties, and it was that you wished to go [68] into that business, and that you then took up this course of study at the vocational school? A. Yes.

Mr. Murphey: That is highly leading and suggestive. I suggest counsel ask questions——

The Court: The answer may stand.

Put your next question.

Q. (By Mr. Hughes): Were you absent from that school at any time during the period?

A. No.

Q. And during that period, August 29, 1955 through October 23, 1955, you were always in Miami, Florida? A. Yes.

Q. Did you ever have sexual intercourse with Ray Gilliland? A. No.

Mr. Hughes: I have no further questions.

The Court: That concludes your examination?

Mr. Hughes: Yes, your Honor.

The Court: Any cross examination at this time?

Mr. Murphey: If I may reserve it, I think it would be in the interest of saving time, if the court please.

The Court: Very well. You may step down.

(Witness temporarily excused.)

* * * * *

BLANCHE LAMPERT

called as a witness on behalf of the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Blanche Lampert.

The Clerk: Will you spell your last name?

The Witness: L-a-m-p-e-r-t.

Direct Examination

Q. (By Mr. Hughes): Where do you now reside, Mrs. Lampert? A. Scottsdale.

Q. What is the address?

A. 3052 South Marshall.

Q. Are you employed? A. Yes.

Q. By whom are you employed?

A. The Walter Winchells.

Q. Did you ever reside at Ray Gilliland's house on 71st Place in Scottsdale, Arizona?

A. Yes. [72]

Q. And you occupied a portion of that house?

A. Yes.

Q. Was that you and your husband?

A. Yes, sir.

Q. And on what dates was that?

A. From May 1st until September 30th, only. From May 15 to June 15th we took our vacation.

Q. Were either you or your husband at that house most of the time during that summer when you weren't on vacation?

A. I would go up to Mrs. Winchell's—that is, when I first went there until I took my vacation I would go to Mrs. Winchell's at 10:00 o'clock in the morning and back at 4:00 in the evening, or

(Testimony of Blanche Lampert.)

in the afternoon, until I came back from my vacation.

Q. By reason of your residence in the Gilliland house did you have an opportunity to observe the visitors to that house in that period?

A. Sure.

Q. Will you tell us if any visitors were there on May 1, 1955?

A. Well, I can't recall the dates. I didn't keep track of the dates because I wasn't interested in them.

Q. Well, isn't May 1st when you moved into the Gilliland residence? A. Yes. [73]

Q. And was there anybody there at the time you moved in?

A. You mean staying there?

Q. Yes.

A. I don't remember if that is when Mr. and Mrs. Blake was there or not. It was right around the time Mr. and Mrs. Blake were staying there.

Q. Now, was anyone else there?

A. You mean staying there?

Q. Yes, ma'am.

A. There was no room for anyone else.

Q. Did Mr. Gilliland stay there?

A. Yes.

Q. Where did he sleep? Do you know?

A. On the porch.

Q. Where? A. On the porch.

Q. Was there anyone there on May 5th after the Blakes had left, we'll say?

(Testimony of Blanche Lampert.)

A. Staying there?

Q. Yes, ma'am.

A. I don't remember whether there was or not. There were so many going and coming. I don't remember whether there was or not on that date.

Q. Well, who came and stayed at the house after the [74] Blakes left, if anyone?

A. I don't think anyone did before we left on our vacation—stayed at the house.

Q. Wasn't Clyde Williams there?

A. Well, I don't know if that would be around that date or not. But Judge Williams, not Clyde.

Q. Isn't it true that Clyde Williams was there also?

A. I don't know Clyde Williams.

Q. Isn't it true that Frank Kerwin was there?

A. He didn't stay there.

Q. Do you know where the stayed?

A. No.

Q. Did Patti Karger ever come and stay there?

A. No.

Q. Where did she stay? Do you know?

A. No. One time she stayed up at the Paradise Valley Guest Ranch.

Q. That was when Mrs. Strong, a sister, was there?

A. Well, that was Ray's sister. I don't recollect that being her name, but it was Ray's sister.

Q. And when Mrs. Meyers was there and all three of them stayed up there.

A. Well, that was in August after I came back

(Testimony of Blanche Lampert.)

from my vacation. Either July or August. Probably July. It was after I came back from my vacation, anyway. [75]

Q. Did you see anything in the house that would lead you to believe that Faye Lyons committed adultery with Ray Gilliland?

Mr. Murphey: I object to that as calling for a conclusion of the witness and being incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Hughes): Well, what did you observe between the conduct of Ray Gilliland and Faye Lyons, if anything?

A. Well, she was down there, and they partied together. I mean they had drinks together. And they argued a little bit.

Q. In fact, all four of you, your husband and yourself and Ray and Faye Lyons sat in the kitchen and ate dinner, and such, didn't you?

A. We have, yes.

Q. What did you observe, if anything, in the conduct of Ray Gilliland and Ann Meyers?

A. Well, Ann Meyers lived there. And she would run around there in her slip and her bra. The morning that Mrs. Gilliland called and she answered the phone she did say, "My God, Ray, that's your wife." And he come atearring in the room. I don't know from which room or where. But they got dressed in a hurry and got out of there. [76]

Q. And where were you?

(Testimony of Blanche Lampert.)

A. Right there in the archway in the living room there. In fact, I hooked up—I don't remember what it was—something for Mrs. Meyers—whether it was her dress, or what it was. But I know I helped her with something.

Q. You were right there in the house?

A. Yes. I was getting—I just came in from our bedroom to get my husband's breakfast before he went to work. And the telephone rang and Mrs. Meyers answered. And when I came on the phone Central said, or Mrs. Gilliland said to me, "Who was that?"

And I said, "It must have been Central, or a cross-wire."

Q. Do you know where Mr. Gilliland slept while she was there?

The Court: While who was there?

Q. (By Mr. Hughes): Mrs. Meyers.

A. I don't know. I know they had a bed out on the porch, out on the—yes, out on the porch, a rollaway out there that was made up.

The Court: Were there two beds in the house?

The Witness: There was one bed in the bedroom and one out on the porch.

The Court: Were they double beds?

The Witness: Yes. [77]

The Court: Both of them?

The Witness: One was a double bed in the main bedroom, and one on the porch was a rollaway double bed.

Q. (By Mr. Hughes): And as far as you know,

(Testimony of Blanche Lampert.)

Mr. Gilliland occupied that rollaway double bed, did he?

A. I don't know where he slept.

Q. Did you go into the house and look around?

A. Sure. Well, I done the work there, changed the beds, and things.

Q. You changed the beds? A. Yes.

Q. What beds were used?

A. Both of them.

Q. When was the first time you ever met Elsinore Gilliland?

A. When I gave a deposition or statement, whatever you call it.

Q. That was the first time you ever met her?

A. I met her, just to meet her, the day that they took her deposition, some time when they were filing papers for divorce, or something. And they stopped in—Phil Barnett and a group of them stopped in at Ray's, and after the deposition—I was in the kitchen and Mrs. Gilliland told me then that there was some spots on that carpet of Ray's [78] that I should get some shampoo and get them out.

And that's the first time I met Mrs. Gilliland.

Q. Was that April 15, 1955?

A. No. I didn't go there until the 1st of May.

Q. Isn't it true that Mrs. Gilliland contacted you and requested that you give a statement on November 2, 1955?

A. Mr. Murphey contacted me.

Q. Isn't it true that on November 2, 1955, you told Mr. Murphey, in reply to the question of how

(Testimony of Blanche Lampert.)

often would Mr. Gilliland have guests at his home when Mrs. Gilliland wasn't around, were they ever alone that you know of, and you answered, "Sure. He had Faye Lyons from Miami; and I think he was a little scared to be alone. He acted like it. He was always going to have somebody come if there was no one there. There had been lots of guests there"?

Mr. Murphey: This is an improper attempt to impeach the witness. It is not the best evidence.

Mr. Hughes: It is not an attempt to impeach the witness.

The Court: What is the purpose of it?

Mr. Hughes: I just want to know if it is true that she said this.

The Court: Well, she is your own witness. Why don't you ask her if it is so? The important thing, unless you are attempting to impeach her, is whether it is true [79] and not whether she said it. She is testifying here.

Q. (By Mr. Hughes): Did you say that, Mrs. Lampert?

The Witness: Will you repeat the question, please?

The Court: The objection is sustained.

You may inquire as to the truth of those statements. I think she has testified to the fact, hasn't she?

Q. (By Mr. Hughes): Was November 2, 1955 the first time you ever talked to Mr. Murphey or Mrs. Gilliland?

(Testimony of Blanche Lampert.)

A. I talked to Mr. Murphey over the phone.

Q. And on that day they had a court reporter and took your statement on November 2, 1955?

A. I don't remember the date, what date. I don't know what date it was.

Q. Did you give Mrs. Gilliland any other statements besides the November 2, 1955 statement?

A. No, I don't think so. I gave several depositions at different times, but I don't—it wasn't for Mrs. Gilliland.

Q. Didn't she call you to give your deposition on May 10, 1956?

A. She never called me for anything.

Q. Just what did Mrs. Gilliland—or, what did you tell Mrs. Gilliland in regard to any of the relationship of [80] Faye Lyons and Ray Gilliland?

A. I told her that Faye Lyons stayed up at the Paradise Valley Guest Ranch, that she would come down there and stay until late in the night or early morning. She didn't live down there. And that I babysat for Faye Lyons the night they had the fuss, and Mr. Gilliland—

Q. One moment, please. You told her that?

A. Yes. And Mr. Gilliland slapped Faye and she threw a glass at him. And she came home. And he took the car away from her.

And Ann Meyers stayed right there at the house with Mr. Gilliland.

Q. And you were right in the house during all this time?

(Testimony of Blanche Lampert.)

A. When I wasn't in there cooking I was over in my own apartment, or my room over there. That was between the main house—where I stayed, and between the main house there was a double carport, room for two automobiles there.

Q. Now, what you have just related is everything you ever told Mrs. Gilliland in regard to this?

A. Only about—like I said, about her running around in her bra and her slip. And I saw Mr. Gilliland run around in just his pajama tops.

The Court: What do you mean by that? Do you mean without the pajama bottoms? [81]

The Witness: That's right.

Q. (By Mr. Hughes): And all of this you told Mrs. Gilliland?

A. Yes, I told her.

Q. Did you tell her before November 2nd or after November 2nd?

A. I don't recall that November 2nd date at all.

Q. Well, before Mr. Murphey took your statement or after?

A. When Mr. Murphey took my statement.

Q. And you never told Mrs. Gilliland that before and that was the only time after that?

A. I had it in the statement.

Mr. Murphey: If the court please, I will furnish counsel with the original of the sworn statement if he desires to use it.

The Court: Do you wish to offer it?

Mr. Hughes: Yes, your Honor.

(Testimony of Blanche Lampert.)

The Court: Place it in front of the witness, Mr. Clerk.

(Whereupon, the document was placed before the witness.)

The Court: Is that the statement you refer to?

The Witness: Yes.

The Court: Do you offer it in evidence? [82]

The Witness: I made it in the statement and Mrs. Gilliland was sitting there listening. And Mr. Murphey took my statement.

The Court: Is that the statement, Exhibit No. 8, which we just talked about here and identified?

The Witness: Yes, sir.

The Court: That fairly states the substance of what you told her?

The Witness: Yes.

Mr. Hughes: I have no further questions, your Honor.

The Court: Any cross examination of this witness?

Mr. Murphey: No questions.

Mr. Anson: Not at this time. We will reserve the right to call Mrs. Lampert later.

The Court: We will take the afternoon recess at this time.

(Short recess.)

The Court: Your next witness for plaintiff?

Mr. Hughes: I call Mr. Kerwin. [83]

* * * * *

BEATRICE NEMER SCHOR

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Beatrice Nemer Schor.

The Clerk: Will you spell it out, please?

The Witness: B-e-a-t-r-i-c-e N-e-m-e-r S-c-h-o-r.

Direct Examination

Q. (By Mr. Hughes): Mrs. Schor, are you acquainted with Fay Lyons?

A. Yes, I am.

Q. And she is this lady right back here (indicating)?

A. Yes.

Q. Did you know Fay Lyons in June of 1955?

A. I did. [119]

Q. How long have you known Fay Lyons?

A. 20 or 23 years.

Q. Did you see Mrs. Fay Lyons in June of 1955?

A. I did.

Q. Where did you see her?

A. Here in Los Angeles.

Q. Would that be June 18, 1955?

A. I think so.

Q. Was she here in Los Angeles any period of time from June 18th?

A. I would say several weeks.

Q. Would you say that she was here June 19th, the 20th, the 21st and 22nd?

A. I would.

Q. Did you and Miss Lyons then go to Scottsdale?

A. Yes.

Q. Did you stay in Scottsdale with Miss Lyons?

A. Yes. I was a guest in her home.

(Testimony of Beatrice Nemer Schor.)

Q. Where did you stay in Scottsdale?

A. At a hotel. I don't know the name of it.

Q. To refresh your recollection, would it be the Paradise Valley Guest Ranch? A. Yes.

Q. Did Miss Lyons have anybody with her besides you?

A. Yes, she had her child Danny. [120]

Q. When she was here in Los Angeles did she have anybody here with her?

A. Yes; here with her child.

Q. Anyone besides her child?

A. Yes. She had a nurse.

Q. Would you say Alice——

Mr. Murphey: Just a moment. I object to the leading question.

The Court: Sustained.

Q. (By Mr. Hughes): Were you a frequent visitor with Fay Lyons while she was here?

A. Yes, I saw her practically every day.

Q. Was Mr. Gilliland with her?

A. Oh, no. I didn't know him.

Q. When you were in Scottsdale did you see Mr. Gilliland? A. Just once.

Q. Were you with Miss Fay Lyons every day when she was in Scottsdale? A. Yes.

Q. Did you ever hear of the divorce action between Ray Gilliland and Elsinore Machris Gilliland? A. Yes, I did.

Q. How did you learn of it?

A. I read it in the newspaper. [121]

Q. And what did you read in the newspaper?

(Testimony of Beatrice Nemer Schor.)

A. That Miss Fay Lyons had been accused of adultery with a Mr. Gilliland.

Q. Approximately when was this?

A. In '55 or '56, I can't remember. It was back several years ago.

Mr. Murphey: I can't hear the witness.

The Court: Do you wish that read?

Mr. Murphey: Yes, please.

The Court: Read the last answer, Mr. Reporter.

(Answer read.)

Q. (By Mr. Hughes): Did you learn of it any other way?

A. Yes. After that clipping, Mr. Pomeranz, Miss Fay Lyons' former husband, came to Los Angeles.

Q. And? A. He visited me.

Q. Did he visit with you?

A. He came to my home.

Q. Did he comment on it?

Mr. Murphey: Now, just a minute. That is objected to as incompetent, irrelevant, and hearsay, and not the best evidence.

Mr. Hughes: If your Honor please——

The Court: Overruled. You may state whether or not he commented on it, but not what he said.

Q. (By Mr. Hughes): Did he comment on it?

A. He certainly did.

Q. What did he say?

Mr. Murphey: The same objection, if the court please.

Mr. Hughes: If your Honor please, it has to do with the element of damage here in that——

(Testimony of Beatrice Nemer Schor.)

The Court: You are offering it not for the truth of what he said, but just——

Mr. Hughes: No, your Honor.

The Court: ——the fact he said it.

Mr. Hughes: Yes.

The Court: It may be received for that limited purpose. Overruled.

Mr. Anson: May I be heard for one moment on that?

The Court: Yes.

Mr. Anson: This obviously goes to the third cause of action, the clipping in the Enterprise. There has been no showing whatever on the main issue involved that it was a publication caused by Mrs. Gilliland. For that reason it is irrelevant and immaterial.

The Court: The ruling will stand, gentlemen. You can't prove everything by one witness. You have to take it one at a time.

Q. (By Mr. Hughes): What, if anything, did Mr. Pomeranz [123] say to you?

A. Mr. Pomeranz said that Fay Lyons was not a fit mother to take care of her child, or to have her child in her custody, if she was named as an adultress. And this he said in the witness of several people in my own home who never met Fay and who didn't know this man.

Q. Did he threaten that he was going to take the child from Fay Lyons?

A. He certainly did. He told me that he was going to fly to Florida and remove the child from

(Testimony of Beatrice Nemer Schor.)

her custody, and I subsequently wrote her this asking her to be sure to watch Danny every minute of the day because he was threatening this in my home.

Mr. Hughes: I have no further questions.

Cross Examination

Q. (By Mr. Murphey): I understood you to testify that you saw Mr. Gilliland once. Where was this?

A. He and another gentleman came to the Paradise.

Q. When?

A. It was probably 11:00 o'clock in the morning; 10:00 or 11:00 o'clock in the morning.

Q. Who was the other gentleman?

A. I am sorry, I don't know. He was a local real [124] estate man. He was a local man; an elderly gentleman, if I remember.

I don't know any of these people. I didn't know him until that time.

Q. And you met Mr. Gilliland, I take it, in Fay Lyons' apartment at the Paradise Valley Guest Ranch?

A. It was outside at the Paradise. We were out at the pool.

Mr. Murphey: Nothing further.

The Court: Any redirect examination?

Mr. Hughes: None, your Honor.

The Court: You may step down.

* * * * *

Mr. Hughes: If your Honor please, the plaintiff will call Mrs. Ida Barr.

IDA MAE BARR

called as a witness by the plaintiffs, being first sworn, was examined and testified as follows:

The Clerk: What is your full name, please?

The Witness: Ida Mae Barr.

Mr. Murphey: If the court please, I rarely ever make a suggestion concerning an examination by opposing counsel of a witness. However, this witness's deposition has been taken, unless the subject matter of conversations is identified she just takes off on unrelated matters that have no bearing on any issue of this case.

I offer that as a very constructive suggestion, rather than have the evidence adduced that would be highly improper.

The Court: Lay the foundation as to time, place and persons present.

Mr. Hughes: I will try, your Honor.

Direct Examination

Q. (By Mr. Hughes): Mrs. Barr, are you, or were you acquainted with Ray Gilliland and Elsinore Gilliland? A. Yes, I was.

Q. What is your occupation?

A. I am a registered nurse.

Q. Did you tend Ray Gilliland?

A. Yes, I did.

Q. The first time you ever met Mr. Gilliland was after his first operation, is that right?

A. Yes, sir.

(Testimony of Ida Mae Barr.)

Mr. Murphey: Just a minute. Let's not lead the witness.

Mr. Hughes: I think I can expedite things, your Honor.

The Court: Proceed. Overruled.

Q. (By Mr. Hughes): Was it after his first operation? A. Yes, sir.

Q. When was that? Was that November 1955?

A. November the 3rd, I think, 1955.

Q. And in the month of November 1955 were you on duty every day that month?

A. Yes.

Q. In the month of December 1955 were you on duty every day? A. I think I was.

Q. And January?

A. I think I missed two days in January.

Q. And February and March were almost the same? A. Just about.

The Court: That would be 1956?

Mr. Hughes: 1956, your Honor.

Q. (By Mr. Hughes): Was that not 1956, Mrs. Barr? A. Yes.

Q. Did Mr. Gilliland have a second operation in June 1956? A. Yes. [127]

Q. And were you his nurse at that time?

A. Yes, sir, I was.

Q. And you were his nurse almost the full month of June 1956? A. Yes.

Q. And in July 1956 you were with him most of that month?

A. Yes, most of the month.

(Testimony of Ida Mae Barr.)

Q. During this time from November 3, 1955 up to and including the day of the death of Ray Gilliland, January 30, 1957, you did extra work for him now and then, is that right?

A. Yes, I did.

Q. He'd call you on the phone and you would go out to take care of him if he was in distress?

A. I certainly would. [128]

* * * * *

Q. Did Mrs. Gilliland ever make any comments as to your relationship with Mr. Gilliland?

A. Oh, yes.

Mr. Murphey: Just a moment. That is irrelevant and immaterial. And I move the answer be stricken for the purpose of the objection.

Mr. Hughes: One moment, your Honor. This is inserted here to show the circumstances under which these things were done, to prove malice in fact, that this woman didn't just pick on these two, Ann Meyer and Fay Lyons, but any woman who so much as said "good morning" to Mr. Gilliland was subject to her tirades.

The Court: Is jealousy malice?

Mr. Hughes: Your Honor, I think it is when it goes to the extreme of striking out and willfully trying to hurt anybody who has by reason of—

The Court: Well, you are begging the whole question when you say that. My question is this: If the fact that a woman is jealous of a husband being around other woman, is that relevant to the issue of malice? I never heard such an argument

(Testimony of Ida Mae Barr.)

before. If it is, why, there are a great many malicious people who don't consider themselves so.

Mr. Hughes: Jealousy, your Honor, I feel can be evidenced by a number—— [133]

The Court: Jealousy can prompt a great many things.

Mr. Hughes: And I think in this instance the jealousy prompted the malice in the hopes to hurt anyone who endeavored to associate with Mr. Gilliland. This just wasn't an instance of——

The Court: Very well. You may answer. The objection is overruled.

Q. (By Mr. Hughes): Did Mrs. Gilliland ever say anything to you in regard to your relationship with Mr. Gilliland?

A. Oh, yes, many times.

Q. Do you recall June 14th or 15th, 1956?

A. Yes.

Q. What, if anything, did she say to you on that date?

Mr. Murphey: Just a moment, if the court please. May our objection be deemed to run to this entire line of questioning?

The Court: Yes. And overruled.

Q. (By Mr. Hughes): What did she say to you on that date?

A. She said that she would have never gotten a divorce if it hadn't been for me.

The Court: Did she accuse you of shacking up with Mr. Gilliland?

The Witness: She was wrong if she did. [134]

(Testimony of Ida Mae Barr.)

The Court: I didn't ask you——

The Witness: I am good at giving wrong answers.

The Court: Did she accuse you of that?

The Witness: No.

Q. (By Mr. Hughes): Did she ever accuse you of sleeping with him?

A. Oh, yes, one occasion.

Q. In fact, one day he called you to come out and take care of Mr. Gilliland and——

Mr. Murphey: This is highly leading, your Honor.

The Court: Yes.

Mr. Hughes: I withdraw the statement, your Honor.

Q. (By Mr. Hughes): Do you recall Christmas 1956? A. Yes. I recall '56.

Q. Did you treat Mr. Gilliland around Christmas 1956? A. I did.

Q. Approximately what date was that?

A. It was Christmas Eve night that I went to his house.

Q. Christmas Eve night, or the day after Christmas, right in there, is that right?

A. Right in there. I can't remember.

Q. That was in answer to a call by him?

A. Yes. [135]

Q. Did he call you on the telephone?

A. Well, he couldn't talk. But we had signals that he would call up for me to come clean out his throat. He had a complete laryngectomy and I

(Testimony of Ida Mae Barr.)

used to have to clean it out so he could breathe. So, I told Mr. Gilliland that I wasn't very well but I'd be happy to come if it was an emergency. He said, "No, it can wait."

So the next day I went out.

Q. And you were with Mr. Gilliland the next day? A. Yes.

Q. And you talked as well as you could with him, and he with you?

A. Yes. He wasn't using his little "talkie." He was writing everything down.

Q. And did he discuss with you or tell you anything of his relationship with Ann Meyer or Faye Lyons or Elsinore Gilliland?

Mr. Murphey: Just a moment. That is objected to as incompetent, irrelevant and immaterial; outside of any issue in this case. The issues are framed by the pre-trial order.

The Court: What could be the purpose of that?

Mr. Hughes: Your Honor, the purpose of that is that we are laying a foundation for the evidence that Mr. Gilliland never had intercourse with Mrs. Gilliland. [136]

The Court: He can't testify in this manner, can he?

Mr. Hughes: That he can't.

The Court: You can't bring his testimony in in such a fashion.

Mr. Hughes: I think it is a declaration against interest if I ever heard of one.

Mr. Murphey: It's also hearsay, your Honor.

(Testimony of Ida Mae Barr.)

The Court: What kind of interest? Financial interest?

Mr. Hughes: Well, maybe we could put in that it was a declaration against a financial interest, too. I think I can lay the foundation for it. And if I don't tie it up, why, of course I am willing to withdraw it.

The Court: Very well. I will receive it subject to a motion to strike.

Mr. Hughes: Thank you, your Honor.

Q. (By Mr. Hughes): Mrs. Barr, what, if anything, did Mr. Gilliland tell you about his relationship with Ann Meyer, Fay Lyons and Mrs. Gilliland?

A. First, he wanted me to open Mrs. Gilliland's gift, Christmas gift to him. And I opened it. And it was a very beautiful gift. Mrs. Gilliland was always good to him.

And then I said, "I don't see why you two people [137] can't get along."

He said, "Well, Mrs. Gilliland has her good points; she has many. But—he says, "she is always accusing me of sleeping with you and Ann Meyer."

Q. And what did he then say, if anything?

A. And he said, "Some years ago I had surgery and I am unable for sexual relations with anybody."

Q. Did he tell you anything else?

A. That is all I remember.

Q. To refresh your recollection, did he tell you that he had told Mrs. Gilliland of this?

(Testimony of Ida Mae Barr.)

A. Oh, yes. And he says, "I told Mrs. Gilliland before I married her of this."

Mr. Hughes: I have no further questions.

Mr. Murphey: Just a moment. I move to strike her entire statement beginning with her statement, "I don't see why you can't get along," upon the grounds of the objection heretofore made; and under the Dead Man's rule, too, your Honor. I think it's highly prejudicial. I think it's taking us into an issue that is completely unnecessary.

Mr. Hughes: If your Honor please, Section 47 of the Civil Code of the State of California, subdivision (2) provides as set out in Mr. Murphey's memorandum; but it also states in Section 48 that malice will not be implied in subdivision (3) of Section 47; that if 47 is reviewed [138] there is under that phrase where there is a qualified privilege to include someone in a court proceeding. And we recognize it was a court proceeding in Riverside. We aren't denying that. But when it is a qualified privilege, the person who makes the allegations in the complaint must have a reasonable belief that such allegations are true. Furthermore, they must have been done without malice.

Now, I think we have shown a *prima facie* case of malice under this particular instance, and we have also shown a lack of a reasonable belief. And that is what her testimony is for. And that is what the testimony is for in regard to the man being ill, as well as in regard to the lack of being able to have sexual intercourse or being impotent.

(Testimony of Ida Mae Barr.)

And that is the theory of the second cause of action, and that's the reason for the deposition at the Visalia Municipal Hospital, and that's the reason for the testimony of the nurse that took care of him from November 1955 through January 30th, 1957.

The Court: Are you suggesting that if a man be impotent he can't have sexual intercourse, couldn't commit adultery?

Mr. Hughes: I am suggesting that if a man were impotent he could not commit adultery.

The Court: Perhaps I had better go back to the [139] dictionary.

Under one theory of that term you might prevail,—

Mr. Hughes: Your Honor, in support of my theory—

The Court: —as far as your definition is concerned it has medical basis.

Mr. Hughes: *People v. Breeding*, which is 19 Cal. Ap. 359—

Mr. Murphey: May I have that citation?

Mr. Hughes: 19 Cal. Ap. 359. The question in a criminal proceeding is that adultery must be shown beyond a reasonable doubt, but in order to substantiate the accusations in a civil proceeding it is necessary only that they show by a preponderance of the evidence. And anything that we take away from any possibility of preponderance of the evidence by reason of their testimony of possible opportunity, I think, cuts into any evidence

(Testimony of Ida Mae Barr.)

that they put there and discredits the fact that there is a preponderance of the evidence or ever will be.

The Court: Assuming all your theories are correct, upon what possible theory is this admissible from the lips of a man now dead?

Mr. Hughes: I don't think it's ever been ruled upon by a competent court, court of competent jurisdiction, whether or not a declaration that "I am unable to have sexual intercourse," is a declaration against interest. [140]

The Court: That exception to the hearsay rule deals with financial interest, doesn't it?

Mr. Hughes: Well, I think that it definitely was the grounds for divorce in this proceeding, and was used as such.

The Court: It was used as such?

Mr. Hughes: Yes, your Honor.

The Court: There is no such evidence here, is there. Perhaps you are wandering out of this record over into the divorce action.

Mr. Hughes: No, your Honor. I was going to try to wander into the annulment proceedings.

The Court: The records of those actions are not before me. I have no judicial knowledge of what those actions are.

Mr. Hughes: I am about to introduce those records.

The Court: Well, they are not here yet.

Mr. Hughes: I have to start somewhere, and I can't put it all in at once.

(Testimony of Ida Mae Barr.)

The Court: Assuming that the defendant here charged her husband with being impotent in a divorce action, that still wouldn't argue the admissibility of a declaration of a dying man, or a man now dead that he's unable to perform the sexual act.

That might be contrary to a great many interests, [141] but I don't see any financial interest involved.

The motion to strike will be granted. The evidence will remain in the record as a record of excluded evidence pursuant to Rule 43(c) if you so wish it.

Mr. Hughes: Does 43(c) allow me to bring this back in, your Honor?

The Court: It permits the evidence to remain as a part of the record so the appellate court can examine it and see whether or not I am correct in my ruling. It's a record of excluded evidence.

Mr. Hughes: Because I think I can tie it back up in here by subsequent witnesses.

The Court: Well, that still wouldn't, in my view, argue the admissibility of this. This man isn't here to be cross examined on it.

Mr. Hughes: All right. I have no further questions of this witness, your Honor.

Cross Examination

Q. (By Mr. Murphey): You recall, Mrs. Barr, that your deposition was taken at Phoenix, Arizona on January 24, 1958? A. Yes, I do.

Q. And it was taken by Mr. Coit Hughes?

(Testimony of Ida Mae Barr.)

A. Yes. [142]

Q. Now, you testified, did you not, at that time——

The Court: Just a moment. Do you expect this for impeachment purposes?

Mr. Murphey: Yes, sir.

The Court: Let's put the deposition before her. Is it here?

Mr. Murphey: The original is with the clerk.

The Court: Mr. Clerk, do you have it?

The Clerk: Yes, your Honor.

The Court: The clerk will place the deposition before her, and if you will tell her the page and line, and let her read it, and then put the question to her.

The Clerk: May I unseal this, your Honor?

The Court: Yes, you may unseal it. Unseal the deposition.

Have there been any defendant's exhibits marked?

Mr. Murphey: I do not believe so.

The Court: This will be marked Defendant's Exhibit A for identification, the deposition of the witness Barr.

(The exhibit referred to was marked Defendant's Exhibit A for identification.)

Q. (By Mr. Murphy): Now, before you examine that document, Mrs. Barr, you are absolutely sure that the occasion that you met Mrs. Gilliland in the lobby of the Mission Inn at Riverside was December 21st? [143]

(Testimony of Ida Mae Barr.)

A. I can't remember all those, but it was the day that we—Mr. Gilliland went to court at River-side to get his divorce.

Q. You are not sure what date that was?

A. No. But it seems like it was on the 21st?

Q. I ask you to look at page 5, line 14.

A. And read how far?

Mr. Murphey: And read to page 8, line 5, if you will, please.

The Court: Read all that to yourself, and then tell us when you are finished reading it, and then he will ask you a question about it, probably.

Are you finished?

The Witness: Well, I am finished with page 7. Do you want me to read more?

The Court: Read page 8. Down to line what?

Mr. Murphey: 5.

The Court: Have you finished?

The Witness: Not quite.

Yes, I finished, Mr. Murphey.

Q. (By Mr. Murphey): Now, you testified at that time, did you not, that you met Mrs. Gilliland in the lobby of the Mission Inn on the afternoon of December 21, 1955, did you not?

A. Yes. [144]

Q. And that you and she had a conversation alone, is that right?

A. Well, we were——

The Court: Did you so testify?

The Witness: Yes.

Q. (By Mr. Murphey): And you relate the con-

(Testimony of Ida Mae Barr.)

versation substantially this way: "Mrs. Gilliland—" exactly this way: "Mrs. Gilliland asked me how Mr. Gilliland was and I said that he was in very poor shape and I was sorry he had to make this trip and Mrs. Gilliland said—told me she had given Mr. Gilliland some money and that he didn't appreciate it and he took off over the country with women and he gambled the money and this was part of his pay. Now, she said—I can't remember the words but I know what she meant—he was getting repaid in other ways, in other words."

You so testified, did you not?

A. Yes, I did.

Q. You further testified that you didn't know what she meant about being repaid, did you not?

A. By Mrs. Gilliland not being repaid?

Q. That you didn't know what she meant by her statement that Ray was getting repaid.

The Court: The question is did you so testify?

The Witness: Yes. Thank you.

Q. (By Mr. Murphey): And you testified further, [145] in response to Mr. Hughes question, that you did not see her again that day, did you not?

A. Not to my knowledge.

Q. Or the next day, isn't that right?

A. That is—I testified to that, but I think I saw her in the courtroom. I wouldn't count that.

Q. Mr. Coit Hughes asked you, "Did she say that Ray is being punished for sleeping with Ann Meyer?"

And you answered, "She said that Ray was be-

(Testimony of Ida Mae Barr.)

ing punished for running around the country with the Meyers person and she didn't say whether Meyers was a woman or a man or anything."

Did you not so testify?

A. I did.

Q. Now, on that conversation I would like to have you examine page 17, line 7 to page 18, line 4. Will you please?

The Witness: I am ready.

Q. (By Mr. Murphey): Now, at the time of taking this deposition you testified, did you not, that this conversation at Riverside was in substance or effect that Ray was being punished for gambling, drinking and running around with women, did you not? A. Yes.

Q. And there was something said about retribution? [146] A. Yes.

Q. And you said yes, there was something said about retribution, is that not correct?

A. Mr. Gilliland—

Q. Didn't you testify that way? A. Yes.

Q. And I asked you this question: "That is all she said on that occasion, is that right?"

And you answered, "Yes." Isn't that correct?

A. That's right.

Q. Now, I ask you to examine page 8, line 14. I withdraw that.

I ask you to continue to examine, if you will, please, page 18, line 5 to page 19, line 26.

A. Yes. I am ready.

Q. And I asked you, did I not, as follows, com-

(Testimony of Ida Mae Barr.)

mencing at page 18, line 5: "And you never heard her mention the name of Ann Meyers with the exception of in March, 1956, isn't that right?"

"A. Mr. Murphey, I can't remember all those dates.

"Q. Well, that is the instance you have testified to when you were fixing up the scrap book and Mrs. Gilliland came up and saw a picture and tore it up? [147]

"A. I did not know whose picture it was.

"Q. And what she says was this, 'We had enough of Ann Meyers'?"

"A. Something to that effect.

"Q. But that is what you have testified to here?

"A. Yes.

"Q. And that is the substance of what she said?

"A. Yes, and I don't even know if it was Ann Meyers' picture.

"Q. Then the first time you heard of Ann Meyers was when you saw her picture in the Los Angeles paper, is that right?

"A. No, I heard of her. You see, well, she said, 'That Meyers person' at Riverside, but I didn't know if she was a woman or a man or anything.

"Q. She never named her first name?

"A. No, that is right, Mr. Murphey.

"Q. Now, the first time that you remember Mrs. Gilliland made any statement concerning Ann Meyers, mentioning her name, was after the divorce in June 1956, is that right?

"A. Yes, after the divorce.

(Testimony of Ida Mae Barr.)

“Q. And in substance she said that Ray had been running around with Ann Meyers and spending her money? [148] “A. Yes.

“Q. That is all?

“A. She named an amount of money.

“Q. But as far as Ann Meyers is concerned, that is all she said on that occasion?

“A. Yes.

“Q. That Ray had been running around with Ann Meyers? “A. Yes.”

You so testified, did you not?

A. Yes, I did.

Mr. Murphy: No further examination.

The Court: Any redirect?

Mr. Hughes: No, your Honor.

The Court: May this witness be excused?

Mr. Hughes: Yes.

The Court: You may step down. You are excused, Mrs. Barr.

The Witness: Thank you.

(Witness excused.) [149]

* * * * *

ELSINORE MACHRIS GILLILAND

called as a witness by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

The Court: Please state your name, please.

The Witness: Mrs. Elsinore Machris Gilliland.

The Court: You have been sworn before?

The Witness: Yes, sir. Not this morning.

The Court: In this case.

(Testimony of Elsinore Machris Gilliland.)

The Witness: Yes, I have.

Mr. Hughes: If your Honor please, we've handed to the clerk pages 41 to 43 of a deposition given by Elsinore Machris Gilliland on April 15, 1955. Mrs. Gilliland, will you examine—— [150]

The Court: Marked Plaintiffs' Exhibit next in order for identification.

The Clerk: It will be Exhibit No. 6 in case No. 20301-WM, your Honor; and in Case 20302-WM it will be Exhibit No. 9.

(The exhibit referred to was marked Plaintiffs' Exhibit 6 in case 20301-WM and Plaintiffs' Exhibit 9 in case No. 20302-WM, for identification.)

The Witness: Which do you wish me to examine? What shall I examine, please?

Mr. Hughes: Will you read those three pages, Mrs. Gilliland, please?

The Court: Read it to yourself, and tell us when you have finished.

Have you finished reading it?

The Witness: I am through.

Direct Examination

Q. (By Mr. Hughes): Mrs. Gilliland, I call your attention to the correction on that. Are those not your initials?

A. Which initials? I don't see them. Where are they?

Mr. Hughes: About the middle of the page there.

The Court: Can't this be covered by stipulation?

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphey: I have not been shown the document. [151]

The Court: Haven't you shown counsel the document?

Mr. Hughes: I did just two minutes ago, your Honor.

The Witness: I didn't write that myself.

Mr. Murphey: Just a minute, Mrs. Gilliland. There is no question pending.

I saw them less than a second when they were taken.

Mr. Hughes: I just got it this morning, your Honor, from Phoenix.

Are those your initials?

The Witness: Yes.

The Court: What are the initials?

The Witness: E.C.M.G.

Q. (By Mr. Hughes): And that is pages 41, 42 and 43? A. 43.

Q. In the deposition taken of you in April, 1955?

Mr. Murphey: If she knows.

Mr. Hughes: If you know.

The Court: Just hand it to the clerk.

(Whereupon the document was handed to the clerk and then placed before the witness.)

The Witness: Find out what date that is. I can't see it. [152]

The Court: Give it to Mr. Murphy. Perhaps we can have a stipulation.

(Testimony of Elsinore Machris Gilliland.)

(Whereupon the document was handed to counsel.)

Mr. Murphey: I offer to stipulate with Mr. Hughes that at the time of taking of the deposition in Phoenix, Arizona on April 15, 1955 in connection with litigation then pending, taking of her deposition by Mr. Philip Barnett representing Mr. Gilliland, that the witness—and, of course, all of this will be subject to my objection, if the Court please.

The Court: Can't you stipulate whether or not this is a true copy of the pages it purports to be of the deposition?

Mr. Murphey: I do not have the deposition, if the court please. Nor did I have a copy of it.

The Court: Very well. Proceed.

Mr. Murphey: That *Mr.* Gilliland was interrogated on the subject matter of a new item, in substance, quoting me, her attorney, "They are very happy and definitely very much married."

In response to that Mrs. Gilliland said that that statement was correct in substance, but "our public has to be satisfied. They have got to know I am happy. If the public doesn't know that I am happy, they are very unhappy. I have my public. [153]

"Q. I don't understand.

"A. I have a public of my own and my public has to be satisfied.

"Q. What roughly is your public?

"A. Oh, I have the whole country. I have my own public. And if they thought Mr. Gilliland was

(Testimony of Elsinore Machris Gilliland.)

mistreating me or very unkind, things wouldn't be very good for him. So we all tried to be facetious. We are divinely happy."

I stipulate that she so testified. And my objection is that it is incompetent, irrelevant and immaterial, and an attempt to impeach the witness on an immaterial point.

Mr. Hughes: If your Honor please——

The Court: Do you accept the stipulation?

Mr. Hughes: I accept the stipulation.

The Court: The objection is overruled. The stipulation is received in evidence. Proceed.

The alleged excerpt from the deposition is marked for identification as Exhibit 6 in the Lyons case and Exhibit 9 in the Meyers case, Mr. Clerk. And the deposition of the witness Ida Barr is Defendant's Exhibit A for identification in both cases, is that right?

The Clerk: That is correct, in both cases.

The Court: You may proceed.

(The exhibit referred to was marked Defendant's Exhibit A in both cases.) [154]

Mr. Hughes: If your Honor please, the clerk has been handed a certified copy of the complaint in the annulment proceeding in Riverside, California.

At this time plaintiffs move that the complaint which is signed and verified by Mrs. Gilliland be admitted into evidence.

Mr. Murphey: That is objected to as being in-

(Testimony of Elsinore Machris Gilliland.)

competent, irrelevant and immaterial to any issue in this case.

The Court: May I see it, Mr. Clerk?

The Clerk: Yes, sir.

(Whereupon the document was handed to the court.)

The Court: It seems to me that it might be more properly admissible on rebuttal than your case in chief. Of course, it is a matter of order of proof.

I will overrule the objection and receive it as Exhibit No. 7 in the Lyons case and Exhibit 10 in the Meyers case.

Is that correct, Mr. Clerk?

The Clerk: That is correct, your Honor.

(The exhibit referred to, marked Plaintiff's Exhibit 7 in Case No. 20301 and Plaintiff's Exhibit 10 in Case No. 20302, was received in evidence.)

Mr. Hughes: If your Honor please, at this time plaintiff Meyers will move for admission into evidence of all [155] the exhibits that haven't been previously admitted. And I am sorry, I have lost track of them. I have been unable to keep up.

The Court: I don't know of any that have not been offered by the plaintiff, except the excerpt from the Gilliland deposition, which is marked as Exhibit 6 in the Lyons case and Exhibit No. 9 in the Meyers case.

Are there any others?

The Clerk: No, those are the only ones, your Honor.

(Testimony of Elsinore Machris Gilliland.)

Mr. Hughes: That statement and all the rest have been admitted.

Q. (By Mr. Hughes): Mrs. Gilliland, when were you married to Ray C. Gilliland?

A. May 3, 1954.

Q. And when were you divorced from Ray C. Gilliland? When did you receive your interlocutory decree?

A. I think I received it—I don't even know.

Q. Would it refresh your recollection if I were to say it was June 13, 1956?

A. Probably so.

Q. Did you ever have sexual intercourse with Ray C. Gilliland during the period of May 3, 1954 through June 13, 1956?

Mr. Murphey: Just a moment. That is objected to [156] as being incompetent, irrelevant and immaterial; no proper foundation laid.

Mr. Hughes: If your Honor please——

The Court: There again it is probably more proper on rebuttal, a matter of order of proof, and the objection will be overruled.

Q. (By Mr. Hughes): Would you answer, please, Mrs. Gilliland? A. No.

Mr. Hughes: I have no further questions, your Honor.

The Court: Any questions?

Mr. Murphey: No questions of this witness at this time.

The Court: You may step down, Mrs. Gilliland.

(Witness excused.) [157]

* * * * *

Mr. Murphey: Very well, your Honor.

Will Miss Fay Lyons take the stand, please.

And I may say this, your Honor, that this is pursuant to cross examination of this witness which I reserved.

FAY LYONS

called as a witness by the plaintiffs, having been previously sworn, was recalled and testified as follows:

The Court: Will you state your name, please?

The Witness: Fay Lyons.

The Court: You have been sworn in this case.

The Witness: Not today. In this case, yes.

The Court: You may proceed.

Cross Examination

Q. (By Mr. Murphey): You were born November 29, 1913 at New York City, were you not?

A. Yes, I was.

Q. Your father's name was Isidore W. Lyons?

A. Yes.

Q. Your mother's name was Elsa Spielholz?

A. Yes, sir. [158]

Q. And you have one sister, Lois Springer?

A. Yes.

Q. You had an elementary and high school education, is that right? A. Yes.

Q. You moved to Florida in 1951? A. Yes.

Q. You have been in show business?

A. When I was a child, up until I was 18 or 17. Then I left show business.

(Testimony of Fay Lyons.)

Q. You were a chorus girl in George M. Cohan Productions?

A. Not exactly, no. I understudied. Shall I continue now?

The Court: You may continue explaining it, if you wish. You may explain any answer you give.

The Witness: Yes. I was 12 or 13 years old, and I had the privilege of being in a George M. Cohan production in which I understudied and did appear in two or three very lovely production numbers. I was not a chorus girl as I think of the term.

Q. (By Mr. Murphey): Now, you were also in one George White show?

A. Yes, when I was 16.

Q. You posed for Flagg as a child for a cover on *Cosmopolitan Magazine*.

A. Yes. James Montgomery Flagg, illustrator, did my head, which appeared on the *Cosmopolitan* cover when I was, oh, eight or nine years old.

Q. You have been married twice? A. Yes.

Q. The first was to Arthur Cohen in 1932.

A. Yes.

Q. You were divorced from Mr. Cohen at Reno, Nevada in 1937, isn't that correct? A. Yes.

Q. The answer? A. Yes.

Q. You married Emanuel M. Pomerantz in 1944 at New Jersey, did you not? A. Yes.

Q. You had one son born by him on March 30, 1949. A. Yes.

(Testimony of Fay Lyons.)

Q. You were divorced from Mr. Pomerantz on April 9, 1952? A. Yes.

Q. At Miami, Florida. A. '52, yes.

Q. Now, you knew Ray Gilliland, did you not?

A. Yes. [160]

Q. You first met him in 1937 at Reno, Nevada, did you not?

A. Yes. My family and I met him then; my mother and my sister and I met him at that time.

Q. You took a trip with Mr. Gilliland to Oregon with five or six other people. You stayed a day or two and returned to Reno, did you not?

A. Yes, I did join these other people and go there, and returned the next day I returned home.

Q. You don't remember whose car was used on this trip?

A. No. That was in 1937, 21 years ago. No, I don't remember the car.

Q. You went to New York in 1938, did you not?

A. I think so.

Q. And you saw Mr. Gilliland in New York, didn't you?

A. Some time after 1938 I did see him in New York. I don't know when.

Q. He visited at your house several times, did he not? A. Yes, he and my—

Q. And you ran into him at a restaurant in New York on one occasion?

A. Yes, unexpectedly I did. I was with friends at Luchow's on 14th Street, New York. I was with friends, and hadn't seen Ray, oh, I don't know, for

(Testimony of Fay Lyons.)

two or three years. And upon leaving the restaurant I heard my name called, and [161] there was Mr. Gilliland with some people. Yes.

Q. Now, in 1954 you were in Miami Beach, Florida, were you not? A. Yes.

Q. And you saw Mr. Gilliland at Miami Beach in 1954? A. I did, yes.

Q. At that time you were working at L'Aiglon?

A. L'Aiglon, yes. "Little Eagle" in French.

Q. You had a hat a cigarette concession, did you not?

A. Among other duties, yes. Yes, I had these concessions.

Q. You personally sold cigarettes?

A. Sometimes.

Q. On one occasion you had dinner at the Patio Restaurant with Mrs. Meyer and Mr. and Mrs. Stern, did you not?

A. No, I did not have dinner. I was—I did not have dinner at the Patio Restaurant.

Q. Now, your hours at the L'Aiglon were approximately 7:30 p.m. to midnight, and at times 2:00 a.m., were they not? A. Yes.

Q. You worked at the L'Aiglon restaurant until approximately April 1956? A. Yes.

Q. By the way, that restaurant closed, did it not, about that time? [162]

A. Did it close at that time?

Q. Yes.

A. Yes. It always closed every April. It was

(Testimony of Fay Lyons.)

open only from early December, or sometime in December, until April. It closed that year.

Q. Now, after this you had a cigarette and hat concession at the Felix Young restaurant.

A. May I explain this, Mr. Murphey?

Q. Did you have a hat and cigarette concession?

A. Yes.

Q. And you took reservations, did you not?

A. Yes.

Q. Now, is there any explanation you want to make?

A. Yes. I think it's probably a little irregular what I do at Felix Young's restaurant, and what I did at L'Aiglon. Actually, if Mr. Young were to be considered a host and Mrs. Young a hostess, then in that same sense I am considered a hostess. So far as selling cigarettes and being a checkroom girl, it is true I do own these concessions. Very often we have the cigarettes, and the very, very fine cigars placed where people pick what they want and put the money in the box. I mean to say, I just think it's fair to say when I might be asked, "Are you a cigarette girl and a check room girl" that I be permitted to explain the details [163] that fit the situation, which I admit are a little unusual.

I greet our patrons. I am on the telephone. And I have personal contact with them, with cigarettes and the check room not entering the picture at all.

Q. But you take reservations?

A. In fact—excuse me—in exchange for these

(Testimony of Fay Lyons.)

concessions—I don't pay for these concessions, you see. I offer my services to the establishment in return for which I own the concessions. I get no salary, receive no salary from L'Aiglon nor the new place, Felix Young restaurant.

Q. Have you completed your explanation that you wanted to make?

A. Well, I think I feel a little better, you know, there is this appellation of cigarette girl and hat-check girl, or something. But, I am sorry for taking so much time.

Q. But you do take reservations?

A. Oh, yes.

Q. You arrange birthday and anniversary parties?

A. No, I don't arrange the parties. It is just that people speak with me and discuss what flowers—incidentally, I do all the flower arrangements for the tables for the parties. I don't make arrangements, but they will speak to me and tell me what they want, and I see that their desires are carried out from A to Z in the kitchen itself. I don't make the arrangements. I just have preliminary discussions [164] regarding the wedding anniversaries or engagement parties or graduation, you know, whatever the occasion calls for.

Q. Have you ever had any person work for you handling cigarette sales and the checkroom at either restaurant?

A. I can only say almost the entire staff. If I am not there one of the captains, one of the wait-

(Testimony of Fay Lyons.)

ers—in this new place, for the last two years we have had a little page boy, Johnny, the page boy, and he handles the cigarettes really more than I do.

Q. You don't pay him, do you?

A. Yes, I do.

Q. You pay these people?

A. I do, certainly. I take care of Johnny, when he helps me, which he does very often. I mean, cigarettes are very incidental to what I do there, actually.

Q. You went out with Mr. Gilliland once in Miami in 1954 after work one night, did you?

A. Yes, to the Patio restaurant, where we were invited to join 10 or 12 people, that being the opening. And that is where I met Mrs. Meyers. Mr. Gilliland introduced me to Mrs. Meyers at that time. And I spent—we got there probably 11:00 or 12:00, and as I said, I don't have any social life because of my hours, working nights and being at home during the day to run my house and take care of my child and that, so I said—— [165]

Q. If you will pardon the interruption. If you will just try to answer the question, I think we will get along better.

A. Well, I am trying to explain how——

Q. If after you answer as concisely as you can, and you want to make any explanation, I think the court will allow you to.

Now, from this party that you have related you drove Mr. Gilliland's car home, did you not?

A. I did, his rental car, because I stayed about

(Testimony of Fay Lyons.)

a half hour and had to go home and go to sleep. And he said——

Q. Now, just wait a minute.

A. I drove his rented car home.

Q. Just a minute.

Mr. Murphey: I think we need a little assistance here from the court. She drove his car home. Now, that is all I asked, and now we get a great big——

The Court: Well, she made an explanation as to why she drove the car home. She is entitled to make the explanation. She answered the question first.

Mr. Murphey: All right.

The Court: Many witnesses make the mistake of wanting to make the explanation first and then answer the question last. [166]

You answer the question first, and then you may make any explanation you wish to.

Q. (By Mr. Murphey): The next day you dropped Mr. Gilliland's car off at Mrs. Meyers' home, did you not? A. Yes, in returning it.

Q. This is all in January of 1954? A. Yes.

Q. Now, let's take 1955. It is a fact that you saw Mr. Gilliland again at Miami Beach, did you not? A. Yes.

Q. How many times?

A. I would think possibly two, possibly three or four. I do remember his being to the house for dinner on, I think, two occasions; and I think at L'Aiglon on one or two occasions. Probably four

(Testimony of Fay Lyons.)

or five. A few. I don't pin down the exact number—but a few times.

Q. Now, let me ask you this: You knew, did you not, that Mr. Ray Gilliland married Elsinore Machris on or about May 3, 1954?

A. Yes, I saw it in the papers, their party, big wedding party.

Q. You knew, did you not, that commencing about January of 1955 that they were having marital difficulties?

A. Yes. I felt very sorry about it.

Q. You knew this when you saw Mr. Gilliland there in Miami Beach in 1955? [167] A. Yes.

Q. Now, how long was Mr. Gilliland there at Miami Beach on this occasion in 1955?

A. Some days. I don't recall. A few days.

Q. Now, the next time you saw Mr. Gilliland was at Scottsdale or Phoenix, Arizona, was it not?

A. Yes.

Q. This was in May of 1955?

A. No, this was in April of 1955. I have the feeling that it was about the 23rd or 24th. L'Aiglon closed, I remember distinctly, on the 16th of that year. And I seem to recollect that it was one week later that I left. I think it was exactly a week later. So I think it was the 23rd of April.

Q. Did you fly out? A. Yes.

Q. Alone? A. Yes.

Q. Mr. Gilliland met you at the airport?

A. Yes.

(Testimony of Fay Lyons.)

Q. And took you to the Paradise Valley Guest Ranch? A. Yes, he did.

Q. Did you register at that place?

A. I don't think I did. There didn't seem to be—we arrived. Mr. Silverman came out, and Mrs. [168] Silverman, the owners of the Paradise Valley Guest Ranch, and my bags were taken in. And they showed me one or two apartments. And nothing was said to me about registering. It didn't come up at all in the conversation. I don't think I registered.

Q. Mr. Gilliland took you up there, did he not?

A. He drove me from the airport and introduced me, stayed a few minutes, and then left, yes.

Q. Had you received a telephone call from Mr. Gilliland inviting you to come out there?

A. Yes. Not exactly inviting, but suggesting or asking me when I thought I would come out, since there had been some discussion with Mother and Dad and me on his trip when he was in Miami some months before about—well, it had to do with the possibility of the family moving to Arizona sometime. It was vague, and so on. And I said that I would come out. And he called. I spoke to him on the phone to tell him when I was coming. To that extent we discussed my coming out.

Q. In other words, just prior to your coming out you phoned Mr. Gilliland that you were coming?

A. Yes, to let him know when.

Q. I understood you to testify that you went out there for the purpose of possible business loca-

(Testimony of Fay Lyons.)

tions, either [169] for the hotel or motel business—

A. Yes.

Q. ———or a restaurant.

A. Yes, possibly.

Q. And that you planned to stay a little while and then return to Miami and take a course on restaurant and hotel management, or cashiering.

A. Yes. Not restaurant but just—it's the hotel operations school, Lindsay-Hopkins — not restaurant, but hotel.

Q. Now, this Paradise Valley Guest Ranch is approximately three or four blocks from Mr. Gilliland's house, is it not?

A. I think so. I would say so.

Q. Did you have any correspondence with Mr. Gilliland about coming out?

A. No, not that I remember. I don't remember any.

Q. How long did you stay at this Paradise Valley Guest Ranch on this first occasion?

A. Six or seven days, or eight. Seven or eight days, or thereabouts.

Q. While there you met Blanche Lampert?

A. Yes, I did, for one day. She started on the 1st of May. But I guess I am getting ahead.

Yes, I did meet Blanche Lampert. [170]

Q. And I take it from what you volunteered that the day after you met her you left, is that right?

A. Thereabouts. I mean to say, she said May 1st. I am not sure. It seems to me that I seen her

(Testimony of Fay Lyons.)

more than once, you know; possibly twice before my leaving May 2nd. However, this I am not sure of. I would say that I saw her once or twice.

Q. You also met Ray Lampert, did you not?

A. Yes.

Q. And he kept up the yard at Mr. Gilliland's home?

A. Yes, he did the yard work, and Blanche did come in late about 4:30 or 5:00 o'clock to cook their dinner. And so my understanding was, and everybody's understanding was that these people were not employed by Mr. Gilliland at all, but in exchange for the room which he let them use they offered their services in a compensatory sort of way.

Q. This house has a room separated from the main house by a carport, does it not?

A. Yes.

Q. And Mr. and Mrs. Lampert occupied the bedroom separated from the house by the carport?

A. Yes, seemed to.

Q. You went down to Mr. Gilliland's house in the evening?

A. I might have gone down in the evening, 7:00 o'clock in the evening when I was invited for dinner, when he had dinner guests, yes. I guess I did go down in the evening on occasion.

Q. How many times were you down there?

A. Just a few times. I don't remember.

Q. Would you tell us how many? Estimate it the best you can.

(Testimony of Fay Lyons.)

A. Go down to his house in the evening. That would be very difficult for me to give you in numbers. Several times.

Q. And when you were there you had highballs, did you not?

A. I don't—well, I might have had an occasional one, one or two; and very often none when the other people were having them, for the reason that I have never liked the taste of alcohol. I just don't. I am not a drinking woman. I don't like it.

Q. Were you ever at Mr. Gilliland's house when there were no other people present?

A. I don't think I ever was, maybe with the exception of when one of the guests would run out to the car or just close to the market a few blocks down the road. Because—I would have normally, but in this case I couldn't have and didn't for the reason that the very first day I arrived there Judge and Mrs. Blake were there, and several of the local people at the house. And as it began to draw towards twilight, I mean just about dusk, somebody said, "I have been watching the car up the road and there is something very odd about this. This car has been parked there for an hour or more with the little parking lights on and I wonder what it's doing there."

And as we looked out that window, the kitchen window, we noticed the car start and come along very slowly, such as ten or 15 miles an hour, from three or four hundred feet up north—is it? Well. I think I said in my deposition. Now, I can't re-

(Testimony of Fay Lyons.)

member the directions. Mr. Gilliland's house being here—in other words, not towards the Valley Ranch, Paradise Valley Ranch, but the other way, Mr. Murphey. And this car, anyway, proceeded very slowly to the house and circled the house, went around by the back where the guests' cars were parked, and then made a full circle, and then went back to the starting point.

And somebody said, "Well, it must be detectives," you know, or "may be detectives, or someone watching the house." And this happened so many, many times after that that I realized that I might be subjecting myself or exposing myself to something very unsavory to me, and I had better not ever be alone with Mr. Gilliland in view of this.

I mean, this is only one incident, of course. There are many others. In other words, we were aware that [173] were were being followed or shadowed or—well, followed, I guess.

Q. Who are "we"? Mr. Gilliland and you?

A. It was common discussion.

Pardon me? The people there. No, the people there.

Q. Who was there?

A. Judge Blake and Mrs. Blake, and the first night, the first evening, I don't know if the Kerwins got in. Then Clyde Williams came.

Q. I meant on this occasion when you saw this car around there.

A. Judge Blake and Mrs. Blake, and some other people were in the house, local people. At this

(Testimony of Fay Lyons.)

moment I don't know if Mr. Carpenter and Mr. Turbeville and those were there, or not. But we were sitting in the kitchen, and I saw the car come around and circle, and—well, I would like to add that in an hour or so I saw the car do the same thing again. This thing was repeated two or three times.

Anyway, I had the feeling that I had come into a hornet's nest or in the midst of something that I would be better off not ever being with Mr. Gilliland.

Q. That made you very wary, didn't it?

A. Well, not weary, no——

Q. I said wary, concerned. [174]

A. Yes. I didn't want to—I realized that I should not be exposed to anything of that nature.

Q. How long was it after you arrived there that you received a call from your mother concerning your father?

A. I think it was just four or five days after I arrived there.

Q. Now, you drove from Scottsdale with Clyde Williams and Ray Gilliland, did you not, in Mr. Gilliland's car; first to Knox City, Texas?

A. Do you know that I cannot remember now distinctly whether Clyde left with us or not. Clyde had come to visit Ray and stay at his house, and they had business to discuss. And he had properties he wanted Mr. Gilliland to look at. And he said that he had to leave immediately or they would

(Testimony of Fay Lyons.)

lose their opportunity with these particular properties.

And I am really not sure whether Clyde left first to go back to Texas, and Ray following in a day or two; or whether Clyde stayed and the three of us left for Knox City. I really don't recall.

Q. Well, if Clyde left first, you drove with Mr. Gilliland to Knox City, is that right?

A. Yes.

Q. Have you any idea what time of day you left Phoenix or Scottsdale?

A. I think it was very early in the morning, 6:00 [175] o'clock, maybe, or 7:00 o'clock, or just dawn.

Q. Did you drive straight through to Knox City? A. I don't remember that.

Q. You don't recall whether you stopped overnight?

A. No, I am sorry. I don't remember.

Q. In any event, you got to Knox City and called on Clyde Williams?

A. We first went to Judge Williams' house.

Q. You had lunch there?

A. At Judge Williams'. That's a different house from Clyde's. It's Clyde's father's home.

Q. And after a matter of a stop of a couple of hours, possibly, you drove from there to Ft. Worth, Texas, did you not?

A. On the way to Ft. Worth we made stops in between at these oil properties.

(Testimony of Fay Lyons.)

Q. But, I mean, you did drive during the one trip from Knox City to Ft. Worth.

A. Yes.

Q. Mr. Clyde Williams and you and Ray Gilliland, is that correct? A. Yes.

Q. When you got to Ft. Worth you stayed at the Ft. Worth Hilton Hotel, did you not?

A. Yes. [176]

Q. Did you register yourself? A. No.

Q. Who did the registering?

A. I am not sure, but I think that Clyde Williams did. I am not sure. Ray had the habit of saying to whoever was there to register, and he could have. I wouldn't say for sure. I didn't.

Q. Did you have adjoining rooms to Mr. Gilliland at that hotel?

A. We had consecutive rooms.

Q. Was there a door between?

A. I don't know.

Q. Would you say that there was not a door between? A. I would not say that.

Q. Where was Mr. Clyde Williams' room?

A. In the very next room to mine. We had three consecutive rooms. Whether they were adjoining or not, I couldn't say one way or the other.

I have noticed that in the older hotels, many of the older hotels have doors because, you know, they can be locked, and they are locked or they are opened at will, if so desired.

I don't know if this did or not. It probably did have. There were doors probably separating each of

(Testimony of Fay Lyons.)

these three rooms, because it is a very old hotel.

Q. And at that club you met some friends of Clyde Williams, didn't you?

A. Met them only in that they left their table, got up from their table to leave, and passed our table, noticed Clyde and said, "Hello, Clyde." And Clyde returned the greeting. And then Clyde introduced Mr. Gilliland and me. And the people left. I mean to say I met them, but very briefly.

Q. Now, isn't it a fact that Mr. Gilliland introduced you as Mrs. Gilliland?

A. It is not the fact, to my recollection, at all. Not according to my recollection.

Q. Do I understand you correctly that you now state that he did not do so?

A. I have no recollection of that at all.

Q. You wouldn't say whether he did or did not?

A. No, I wouldn't. There were other people there. It is within the realm of possibility. He might have said this while I was engaged in greeting one of the wives or the ladies. I don't know. To my recollection I certainly didn't hear him say that.

Q. That is your present memory, is that it?

A. Yes.

Q. Now, you spent the night there at the——

A. Yes, we all stayed that night, because the men [178] had business to do in the morning. That was the reason for their going there.

Q. You occupied the bedroom adjoining Mr. Gilliland's bedroom?

A. Connecting.

(Testimony of Fay Lyons.)

Q. Yes.

A. Well, I don't mean that "connecting." I mean next to. The three rooms were one next to the other. That is what I meant when I said "consecutive." The three were together. I was in the center one.

Q. The next day Mr. Williams and Mr. Gilliland went out to the golf tournament, didn't they?

A. Yes, they did, in the afternoon. In the morning they were out on business.

Q. Now, Mr. Gilliland gave you some money as they left to go to this tournament with which to do some shopping, did he not?

A. He did not. He did ask, because he and Mr. Williams had been shopping, and he had bought himself many new things, and he had asked me, "Would you like to do some shopping and get yourself a little present this afternoon?"

And I told him, "No," that I didn't. And I told him what I planned to do with my afternoon. And I did it. It was personal.

Q. He offered you money but you refused it?

A. Yes, I did.

Q. Now, did you have dinner at the Hilton Hotel that night with Mr. Gilliland and Mr. Williams?

A. Yes.

Q. Now, the next day Mr. Gilliland and you left in his car for Miami, Florida, did you not?

A. Yes, I did. The reason that I drove from Scottsdale to Ft. Worth was only after not being able to get an airline reservation, a ticket out of

(Testimony of Fay Lyons.)

Scottsdale to Miami. So it was at Mr. Gilliland's suggestion, when he discovered that he had to leave immediately to meet Mr. Williams, he had to leave quickly, because Mr. Williams had told him——

Q. Excuse the interruption. You have already given that explanation as to the trip to Ft. Worth. But I now ask you if you didn't from Ft. Worth drive with Mr. Gilliland to Miami, Florida?

A. Yes. Only because I couldn't get an airplane reservation, either, out of there, which Mr. Gilliland and Mr. Williams had almost promised me. They said, "It will be easier for you to leave Ft. Worth because Dallas is right next to it and you will have more opportunity to get a ticket." Whereas in Phoenix they said, "We have nothing. We have no reservations. Maybe in three or four days." And I had to get home quickly, because of my father's stroke. So, I think that that fits in. But it turned out that I was [180] compelled to drive from Ft. Worth to Miami, because there was no other way I could get there.

The Court: It's time for the noon recess.

Had you finished?

The Witness: Yes.

The Court: We will take the noon recess at this time until 2:00 o'clock.

(Whereupon a recess was taken until 2:00 o'clock p.m. of the same day.) [181]

Wednesday, June 4, 1958; 2:00 P.M.

The Court: Are there any ex parte matters?

The Clerk: No ex parte matters, your Honor.

The Court: You may proceed with the case on trial.

FAY LYONS

called as a witness by the plaintiffs, having been previously sworn, resumed the stand and testified further as follows:

Cross Examination—(Continued)

Q. (By Mr. Murphey): Miss Lyons, we had reached the point where you left Ft. Worth with Mr. Gilliland in his car.

What was the first city you stopped at?

A. I don't remember.

Q. What hotel did you register at?

A. I don't remember.

Q. What hotel did you stay at?

A. I don't remember.

Q. Do you know?

A. I don't remember.

Q. Do you have any knowledge of any of the cities you stopped at between Ft. Worth and Miami Beach? [182]

A. I remember New Orleans. I remember Tampa. Before that I think Alabama. Montgomery, I just remember those.

Q. Do you remember the names of any of the hotels that you stayed at, or motels? A. No.

Q. Did you have adjoining rooms with Mr. Gilliland in each of these hotels, or motels?

A. Sometimes; depending on the available rooms

(Testimony of Fay Lyons.)

at the time. Sometimes they were next to each other and sometimes they weren't.

Q. Well, is it of any importance to you whether they were adjoining or not?

A. Absolutely none.

Q. Did Mr. Gilliland do the registering at these hotels or motels?

A. On occasion. Sometimes he did. Sometimes I did.

Q. It is a fact, is it not, that Mr. Gilliland paid all of these lodging bills?

A. At the motels, yes.

Q. Or hotels? A. Or hotels, yes.

Q. Isn't it a fact that Mr. Gilliland paid for your meals on this trip? A. Yes.

Q. Now, when you got to Miami Mr. Gilliland stayed [183] at North Beach, did he not?

A. Yes.

Q. He was in town two or three days, isn't that the fact?

A. I wouldn't be sure. I recollect that he left either the following day, the day after our arrival at my home, after arrival in Miami, he left the following day or the one after that. So, one or two days later. I would be sure of that.

Q. Before he left, I believe you testified on direct examination that he phoned you.

A. Yes.

Q. Saying, in substance, he was leaving for Scottsdale. A. Yes.

Q. And would like to see you. A. Yes.

(Testimony of Fay Lyons.)

Q. And he stopped by at your home to say good-bye, is that right? A. Yes.

Q. While he was there isn't it a fact that you went over to Mr. Gilliland's hotel and stayed two or three hours in the afternoon?

A. I went once with my little boy in the afternoon. We went swimming. And we stayed an hour or two, and then left. [184]

Q. On that occasion you invited him back for dinner, did you not? A. Yes, I think I did.

Q. Do you recall seeing him any other time at Miami while he was there on this occasion?

A. No, I don't remember.

Q. You stayed there about a week or ten days, did you not? A. I think so.

Q. Then you flew out to Phoenix with your son, did you not? A. Yes.

Q. Mr. Gilliland met you at the airport?

A. Yes.

Q. He took you out to the Paradise Valley Guest Lodge? A. Yes.

Q. Or ranch. A. Yes.

Q. And did you register on this occasion?

A. I don't remember doing so.

Q. You occupied the same apartment, No. 1?

A. Yes.

The Court: The same as what?

Mr. Murphey: The same apartment, No. 1. [185]

The Court: As when?

Q. (By Mr. Murphey): That was the same apartment that you had when you stayed there be-

(Testimony of Fay Lyons.)

fore, was it not, No. 1? A. I think so.

Q. You stayed there about three or four weeks, did you not?

A. My stay was interrupted by a trip—you mean in total? I mean, I stayed there for a little while and then I went to Los Angeles and returned. I don't quite understand the question. You mean without interruption?

Q. Your over-all stay at the Paradise Valley Guest Lodge after you came back from Miami was three or four weeks, was it not?

A. I'd say—I think I remember—I'd say maybe four or five, all together. I think it was more than three. I think I arrived maybe the third or fourth of June on the second strip with my little boy, and left July 7th for Miami. So I think that would be five weeks, or thereabouts; more than three.

Q. Did you see Mr. Gilliland while you were in California on this trip?

A. No. I didn't know his whereabouts while I was here.

Q. As I understood you on direct examination that trip to Los Angeles took some five days. [186]

A. I think so.

Q. And when you returned you stayed at the Paradise Valley Guest Lodge? A. Yes.

Q. When you returned Miss Schor, or Beatrice Schor went with you? A. Yes.

Q. When you were at Scottsdale the first time your son was not with you, was he?

A. No, he was at school.

(Testimony of Fay Lyons.)

Q. When you returned from Miami about June 3rd or 4th, your son was with you? A. Yes.

Q. When you first arrived at Scottsdale upon your return from Miami Beach, Ray Gilliland and Mr. Clyde Williams drove out to the Paradise Valley Guest Lodge, did they not? A. Yes.

Q. And they were driving a brand new Dodge sedan automobile, were they not?

A. Yes, they were.

Q. Now, isn't it a fact that Mr. Gilliland handed you the keys and said, "Here, this is all for you." Or, "This is for you." A. No.

Q. What did he say? [187]

A. He said, "It's all yours to use while you are here. Something—I mean, not verbatim, but, "It's all yours to use while you are here." Which I did.

Q. Did he say anything, in substance, "You can't be without one"?

A. He said, "It's very hard to be in this country without a car," or something to that effect: "very difficult."

Q. Didn't he say, "this is your car"?

A. I don't remember those words.

Q. Would you say that he did not say, "This is your car"?

A. I would say that. I would say that he did not say, "This is your car." He could have said, "This is your car to use for your stay here;" or, "you just help yourself and use it as you please while you are here."

(Testimony of Fay Lyons.)

Q. While you were there you used this Dodge automobile, did you not? A. Yes.

Q. It is a fact, is it not, that Mr. Gilliland gave you money?

A. He at one time gave me money——

Q. When was that?

A. ——for a dog for my boy.

Q. When was this?

A. I don't remember. It was when Dan was there. It [188] had to do with a dog that he'd get for Dan. And I went down to the little shop in the village of Scottsdale and I looked at two or three—one or two poodles, I remember, and one little griffon. And then I said to my child that I thought it would be better, more practical, to wait until we returned home to Miami to get a dog. And I didn't think we should have a dog on the trip. And Mr. Gilliland did give me money to get the dog for Dan when we got home.

Q. He gave you \$200, didn't he?

A. Yes, I think it was that.

Q. When he handed it to you he said he had won it? A. Yes.

Q. And for you to buy something for Dan?

A. Yes.

Q. And you took the money? A. Yes.

Q. Now, when you returned from Miami you saw Mr. Gilliland on many occasions, did you not?

A. When I returned from Miami?

Q. To Scottsdale.

A. From Miami to Scottsdale. Yes.

(Testimony of Fay Lyons.)

Q. Was this daily? A. No.

Q. How often? A. Several times. [189]

Q. During the total of three weeks how many times would you estimate you saw Mr. Gilliland?

A. Eight or ten.

Q. Did he take you to dinner? A. Yes.

Q. Did he take you to lunch?

A. No, I don't remember lunch.

Q. He did take you on a trip, did he not, to Prescott to some rodeo?

A. Yes, we took a trip one morning with my little boy to see the rodeo, and we left at 10:00 or 11:00 o'clock, and we were back about 5:00. We didn't see the complete rodeo. And I know that we returned before dinnertime back to Scottsdale, the three of us. I wanted Dan to see a rodeo.

Q. On these occasions when you saw Mr. Gilliland you saw him at his home, did you not, in Thornwood Acres? A. Not always.

Q. How many times did you see Mr. Gilliland during this three weeks at his home?

A. Several. I don't know. Seven or eight, maybe.

The Court: Have you about concluded?

Mr. Murphey: I haven't very much more, your Honor. I have a little bit more.

Q. (By Mr. Murphey): Did you ever go to Mr. Gilliland's house in the late afternoon and stay until 2:00 or 3:00 [190] o'clock in the morning?

A. No.

(Testimony of Fay Lyons.)

Q. Did you ever have highballs with Mr. Gilliland alone in his home?

A. I don't remember.

Q. Would you say that you did not have highballs with him in his home alone?

Mr. Hughes: Your Honor, I object to that line of questioning. The question has been asked and answered.

The Court: Sustained.

Q. (By Mr. Murphey): Did Mr. Gilliland, to your knowledge, stay at the Paradise Valley Guest Lodge at any time while you were there?

A. No.

Q. You had an argument or disagreement with Mr. Gilliland, did you not, at which time he took the automobile away from you? A. No.

Q. Did you ever throw a glass at him?

A. No.

Q. Did he ever slap you? A. No.

The Court: Did you ever slap him?

The Witness: No, your Honor.

Q. (By Mr. Murphey): Let me ask you, did you phone [191] George Therrell at San Francisco in June 1955 and ask him where Ray Gilliland was?

A. No. I never have heard the name before you asked me that when you took my deposition. I didn't know the name.

Q. You have testified that you went to Phoenix with the idea of buying a business, did you not?

A. Yes.

Q. Well, as a matter of fact, when you left for

(Testimony of Fay Lyons.)

Scottsdale you had seven to nine hundred dollars, didn't you? A. Thereabouts, I think.

Q. And that is all you had?

A. Yes, thereabouts. Several hundred. Thereabouts.

Q. You flew out, did you not? A. Yes.

Q. Isn't it fact that Mr. Gilliland wired you the money for the plane fare from Miami to Scottsdale, or Phoenix?

A. He did, I think, before I went back the second time with my boy, because the preliminary negotiations and meetings regarding this business, or a business, were interrupted. We hadn't finished the first trip when I headed back for Miami. And so it was necessary to go out [192] again and complete these meetings.

Q. In any event, you accepted this money for fare?

A. He wired it to me, unbeknownst to me, and he said something about that that was for the return ticket.

Mr. Murphey: I would like to ask this witness some questions from her deposition, if the court please.

The Court: Impeaching questions?

Mr. Murphey: Yes.

The Court: Very well. On subject matter not heretofore covered?

Mr. Murphey: Well, her answers in response to certain of these questions do not correspond with the statements in her deposition.

(Testimony of Fay Lyons.)

The Court: Very well.

Mr. Hughes: If your Honor please, I am going to object unless the impeachment is done in the proper form by submitting the deposition to the witness.

Mr. Murphey: I would ask that the deposition be submitted to her.

The Court: Is it on file with the clerk?

Mr. Murphey: Yes, your Honor.

The Court: Mr. Clerk, get the deposition of the plaintiff Fay Lyons and open it.

Do you have it, Mr. Clerk?

The Clerk: Yes, your Honor. [193]

The Court: It will be marked Defendant's Exhibit B in both cases.

(The exhibit referred to was marked for identification in both Case No. 20301 and Case No. 20302.)

The Court: Place it before the witness.

(Whereupon the exhibit was placed before the witness.)

The Court: What page number and what lines do you wish me to read?

Mr. Murphey: Page 26, line 15.

The Court: Through line what?

Mr. Murphey: To line 23.

The Court: Read it to yourself, and let us know when you have completed it.

The Witness: Yes, your Honor. 15 through 23?

Q. (By Mr. Murphey): Yes.

A. I am finished.

(Testimony of Fay Lyons.)

Q. You testified, did you not, that you went to Scottsdale for the first time in May 1955?

A. Yes. Because you had mentioned that month first, and I did say yes, in May. It was the end of April.

Mr. Murphey: I would ask you to turn to page 19, if you will, please.

The Court: Let's not spend any time on discrepancies in dates unless they are really very vital.

Mr. Murphey: Well, they aren't of too much importance.

The Court: We all have difficulty remembering time.

Mr. Murphey: If the court please, no further cross examination of this witness.

The Court: Any redirect?

Mr. Hughes: Just a couple of questions, your Honor.

Redirect Examination

Q. (By Mr. Hughes): Miss Lyons, the clerk will show you what purports to be receipts for payment of lodging at the Paradise Valley Guest Ranch. Will you look at them and identify them, if you can?

A. Yes.

The Court: Have they been marked?

Mr. Hughes: Yes, your Honor, receipts from the Paradise Valley Guest Ranch, and receipt from the Del Capri Motel in Los Angeles, California.

The Court: Do you wish them marked as one exhibit?

(Testimony of Fay Lyons.)

Mr. Hughes: As one exhibit, your Honor.

The Court: They will be marked Plaintiff's Exhibit 8 in the Lyons case for identification. Is that [195] correct, Mr. Clerk?

The Clerk: That is correct, your Honor.

(The exhibit referred to was marked Plaintiff's Exhibit No. 8 in Case No. 20301.)

The Court: Place it before the witness.

These are not to be marked in the Meyer case, I take it?

Mr. Hughes: No, your Honor.

(Whereupon the exhibit was placed before the witness.)

Q. (By Mr. Hughes): Do you recognize all those? A. Yes.

Q. Those are the receipts you received when you paid your bill at the Paradise Valley Guest Ranch and also receipts when you paid your bill at the Del Capri in Los Angeles? A. Yes.

Q. And the dates that those receipts show occupancy were the dates on which you were at both of those places? A. Yes.

Mr. Hughes: I move this be admitted in evidence, your Honor, as Plaintiff Lyons' Exhibit 8.

The Court: Any objection?

Mr. Murphey: No objection.

The Court: Received in evidence, Exhibit 8 for [196] identification.

(The exhibit referred to, marked Plaintiff's Exhibit 8 in Case No. 20301, was received in evidence.)

(Testimony of Fay Lyons.)

Mr. Hughes: We are now moving, your Honor, to place before the court a guarantee policy and a copy of a conditional sales contract on the Dodge automobile.

The Court: Both marked as a single exhibit?

Mr. Hughes: As a single exhibit.

The Court: It will be Defendant Lyons' Exhibit 9 for identification and the clerk will place them before the witness.

The Clerk: Yes, your Honor.

(The exhibit referred to was marked Plaintiff's Exhibit 9 for identification in Case No. 20301.)

(Whereupon the exhibit was placed before the witness.)

Q. (By Mr. Hughes): Do you recognize those papers, Miss Lyons? A. Yes.

Q. Are those papers evidence that the car, one Dodge automobile, was, in June 1955, purchased by Ray C. Gilliland?

Mr. Anson: I object to that as calling for the conclusion of the witness.

The Witness: Yes.

Mr. Anson: I move to strike the answer. [197]

The Court: Yes. The documents, I assume, speak for themselves.

Do they cover the automobile?

Mr. Hughes: They cover the automobile.

The Court: The Dodge automobile we have been discussing?

(Testimony of Fay Lyons.)

The Witness: Yes.

Mr. Hughes: We move they be admitted.

The Court: Any objection?

Mr. Murphey: No objection.

The Court: Received in evidence as Exhibit 9 in the Lyons case.

(The exhibit referred to, marked Plaintiff's Exhibit 9 in Case No. 20301, was received in evidence.)

Mr. Hughes: I have no further questions, your Honor.

Mr. Murphey: No further questions, your Honor.

The Court: You may step down, Miss Lyons.

(Witness excused.)

The Court: The defendant's next witness?

Mr. Murphey: I offer at this time the stipulation counsel have entered into regarding Clyde E. Williams, that he be deemed to have been called and sworn and testified in accordance with the stipulation.

The Court: Any objection to the offer of it in [198] evidence?

Mr. Hughes: No, your Honor.

The Court: Received in evidence as Defendant's Exhibit C in both cases.

The clerk will file it and mark it in evidence.

(The exhibit referred to, marked Defendant's Exhibit C in both case No. 20301 and 20302, was received in evidence.) [199]

Mr. Murphey: I will call Mrs. Lampert. I think I reserved cross examination of her.

The Court: Very well.

BLANCHE LAMPERT

called as a witness on behalf of the plaintiff, having been previously duly sworn, resumed the stand and testified further as follows:

The Court: Will you state your name again, please?

The Witness: Blanche Lampert.

The Court: You have been sworn?

The Witness: I have.

The Court: Be seated.

Mr. Murphey: Would the clerk please show the witness Exhibit No. 8 and Exhibit No. 5, respectively, the sworn statement of Mrs. Lampert?

The Clerk: And the photograph?

Mr. Murphey: Just the sworn statement, Mr. Clerk, please.

(Whereupon, the exhibit was placed before the witness.) [229]

Cross Examination

Q. (By Mr. Murphey): You have before you a sworn statement, Mrs. Lampert. Was that taken on November 2, 1955, at Phoenix; I mean at Scottsdale?

A. Yes.

The Court: Has this been marked?

The Clerk: Yes, your Honor. It is in evidence.

The Court: Well, refer to it by exhibit number and I will know what you are speaking of.

(Testimony of Blanche Lampert.)

Mr. Murphey: Yes, sir.

The Court: Exhibit 5, is it?

Mr. Anson: 5 in the Lyons case, your Honor, and 8 in the Meyers case.

The Court: Very well.

Q. (By Mr. Murphey): Do you recall that that statement was taken on November 2nd before a court reporter? A. Yes.

Q. And after it was taken did you read it?

A. I did.

Q. Did you swear to it before that court reporter? A. I did.

Q. And immediately prior to that, say, on November 1st, did you have a telephone conversation with me? [230]

Mr. Hughes: I offer it in evidence, your Honor.

The Court: Received as Exhibit No. 8.

Mr. Anson: Exhibit No. 8, your Honor?

The Court: Exhibit No. 8, is it not, Mr. Clerk?

The Clerk: Exhibit No. 8 in Case No. 20302.

The Court: Do you offer it in both cases?

Mr. Hughes: Yes, your Honor.

The Court: It will be Exhibit 8 in the Meyers case, and Exhibit 4—would it be—in the Lyons case?

The Clerk: Exhibit No. 5.

The Court: Yes, Exhibit No. 5 in the Lyons case.

(The exhibit was marked Plaintiff Meyers'

Exhibit 8 and Plaintiff Lyons' Exhibit 5 for identification, and was received in evidence.)

Q. (By Mr. Hughes): Now, what is contained

(Testimony of Blanche Lampert.)

in that statement is everything you ever said on this matter?

Mr. Murphey: Just a minute, counsel. That is calling for the conclusion of the witness.

The Court: That isn't fair. She hasn't even had a chance to read it. It is unfair to ask her to make a comparison, anyway. You may examine her about what she said. She has testified to it, hasn't she?

When you say that you told Mrs. Gilliland, do you mean that you made it in the statement? [231]

A. I did.

Q. Were there any persons present that you can recall at your end? A. No.

Q. Would you proceed to tell the court the substance of that telephone conversation?

A. You——

Mr. Hughes: I object, your Honor. The statement is in and it is an exhibit. I don't know what materiality her conversation with the defense counsel has.

The Court: What is the purpose of it?

Mr. Murphey: Nothing more than to show corroboration of Mrs. Gilliland's testimony that she did not discuss the matter with Mrs. Lampert; but to show that Mrs. Gilliland merely told Mrs. Lampert that I would call her and arrange to take this. And then, also, there was an additional subject matter I would like to interrogate her on.

The Court: In this telephone conversation?

Mr. Murphey: Yes, sir.

(Testimony of Blanche Lampert.)

The Court: Is this a foundation for impeachment?

Mr. Murphey: No; additional information.

The Court: Very well. Proceed. You may answer.

The Witness: May I have the question again, please?

Q. (By Mr. Murphey): You said you had a telephone conversation with me [232] the day before that was taken. That would make it November 1, 1955. Do you recall that conversation, what was said?

A. You called me up and asked me if I would give a statement or a deposition, whatever you call it, that Mrs. Gilliland had told you that I had some information that you wanted to know.

Q. Now, is there correctly set forth in that sworn statement the substance of what you said to Mr. and Mrs. Gilliland, or Mrs. Gilliland, myself, on that occasion? A. Yes.

Q. Now, did you tell me that Faye Lyons——

Mr. Hughes: I object, your Honor, without a foundation. If he wants to know what she saw or what she observed, why, that is something else.

Mr. Murphey: This doesn't go as to the truth, necessarily, your Honor.

The Court: Then don't lead her.

Mr. Murphey: Well, it is cross examination.

Mr. Hughes: It may be cross examination, your Honor; but what she told Mr. Murphey as to the portion that Mrs. Gilliland told her that he was

(Testimony of Blanche Lampert.)

going to call, and that sort of thing may be material and relevant, but what he is asking now is about Faye Lyons or some such thing as that. If she wants to know what she observed in regard to Faye Lyons or Mrs. Meyers or anybody else I think you should ask [233] her what she observed and not what she told him over the telephone.

Mr. Anson: One of the issues in this case is whether Mrs. Gilliland acted with reasonable cause when she filed her cross-complaint. The information on which she acted is material to the privilege she claims.

The Court: There is no question about it. Is it offered for that purpose?

Mr. Murphey: Yes, sir.

The Court: Very well. Answer the question.

Mr. Hughes: If your Honor please, Mrs. Gilliland has testified that the only information she received in regard to that matter was what she received from Mrs. Lampert——

The Court: And her husband.

Mr. Hughes: ——and Mrs. Lampert's statement is in the record of what she had to say in regard to that.

The Court: Perhaps she didn't put it all on the statement. I don't know. We will see. Proceed. You may cross-examine.

I had overlooked the fact for the moment that this was cross examination.

Q. (By Mr. Murphey): Did you make any statement to me, in substance or effect, that Faye Lyons

(Testimony of Blanche Lampert.)

and Mr. Gilliland were going to Las Vegas? [234]

A. Yes.

Q. And what did you tell me in that regard, if you recall?

A. I don't remember just what I told you about them going to Las Vegas. I remember about when he and Ann Meyers went to Vegas, but I don't remember about Faye Lyons.

Q. Now, on the occasion that you have mentioned in your statement about Mr. Gilliland and Faye Lyons getting into an argument—did you hear that argument?

A. I remember about that, yes. It was the last night——

Mr. Hughes: I would like to know, your Honor, the date, time, place, and who was present—the foundation.

Mr. Anson: This is cross examination, your Honor.

The Court: Let's have it so we will know. We can follow the testimony better, anyhow.

The Witness: Mr. Gilliland——

The Court: Just a moment. Let's find out where it was and who was there.

Q. (By Mr. Murphey): Do you remember when it was?

A. It was the last day or the next to the last day that Faye was out at Scottsdale before she left. And she didn't go to Vegas. She went home. Mr. Gilliland asked me—they had been having trouble and Faye said she could not have anything more to do

(Testimony of Blanche Lampert.)

with him, that he was drinking too [235] much. So Mr. Gilliland asked me if I would go up and babysit so he and Faye could talk things over.

So I went up and babysat with the little boy. And pretty soon, not too late, because she wasn't gone very long, Faye came home.

Q. Where was this?

A. At the Paradise Guest Ranch. And Mr. Gilliland brought her home. And I said to her, "Where is the Dodge?"

She said, "He took it away from me. We had a fight." She said, "He slapped me and I threw a glass at him."

I went back down to Mr. Gilliland's home and he told me the same thing. I swept up the glass.

But before I went I said to Faye, "Are you still going to Vegas?"

"No," she says, "I am going back home to Miami."

Q. All right. Now, on another occasion was there an argument? Did an argument develop while there were guests at the house?

A. Yes. The night that Judge and Mrs. Blake, Phil Kent and his wife and Faye and Mr. Gilliland—we had a steak dinner there at Mr. Gilliland's home. Mr. Blake and I cooked the dinner, and Mr. Gilliland got pretty—well, he drank quite a bit and got very obnoxious. So Faye said to him, "Take me home." [236]

So he took her up to the Paradise Valley Guest Ranch and he didn't come back. And the next morning I took my husband to work when he was

(Testimony of Blanche Lampert.)

a gardener there, and Mr. Gilliland, about a quarter to 8:00, came out of her apartment, and his car was still sitting in front of her apartment. And Lee was there—that is, Mrs. Silverman—and she really gave Ray the dickens for staying up there.

Q. Now, during the period that Ann Meyers was there at Scottsdale did you ever see Mr. Gilliland and Ann Meyers in her bedroom? A. Yes.

Q. And on how many occasions?

A. Several occasions.

Q. How was she dressed?

A. Very scantily.

Q. What did she have on?

A. One time a thin gown. Another time her slip.

Q. And where was Mr. Gilliland?

A. He was laying on the bed.

Q. What did he have on?

A. One time his shorts. Another time his pajama tops.

Q. When was this with relation to the time of day that you observed them there?

A. Well, one time my husband and I came home from work and we came into the kitchen, and there is an arch between [237] the kitchen—you can look straight into the bedroom, and they were laying on the bed then, and they got up and closed the door real quick like.

Mr. Hughes: Your Honor, I move that that be stricken, unless the date is established for that.

Q. (By Mr. Murphey): Can you establish a specific date that you observed that?

(Testimony of Blanche Lampert.)

A. I couldn't just say exactly the date. It was between—after I came back from my vacation, it was between then and the time she left. I don't remember those dates. I wasn't keeping track of them.

The Court: The time who left?

The Witness: Mrs. Meyers.

The Court: When did you come back from your vacation?

The Witness: The 15th of June.

The Court: What year?

The Witness: 1955.

The Court: What time in June did Mrs. Meyers leave?

The Witness: She left along in August.

The Court: The same year?

The Witness: The same year, yes.

Mr. Hughes: If your Honor, I would like the other [238] question as to when she arrived, at least to get it down within a month or so.

The Court: When who arrived?

Mr. Hughes: Mrs. Meyers.

The Court: Well, the witness has said it was after she came back from her vacation, which was about July 15th. Is that it?

The Witness: Mrs. Meyers?

The Court: No. When you came back from your vacation.

The Witness: Yes, it was July 15th when I came back.

(Testimony of Blanche Lampert.)

The Court: Between that time and the time Mrs. Meyers departed, and that was around the 1st of August?

The Witness: When we came back from our vacation Mrs. Lyons was still there, and then she left and Mrs. Meyers came.

Q. (By Mr. Murphey): Did you ever observe Mr. Gilliland kissing Faye Lyons?

A. Once or twice.

Q. When?

A. In the kitchen out by the bar when we were all sitting out there.

Q. Where was this? What house? [239]

A. At Mr. Gilliland's house.

Q. Was anybody else present?

A. My husband and I.

Q. Is that the same on both occasions?

A. Yes.

Q. Did Mr. Gilliland ever make any statement to you concerning his sexual inclinations with women? A. He just said that he——

Q. Yes or no, please. A. Yes.

Q. When was this?

A. One time when my husband and him was discussing women and being with women, and things.

Q. And what period, about what month would you say?

A. Well, it was—well, it was the same time I was living there, from July—or, during July and August, when I was there.

Q. Where did this conversation take place?

(Testimony of Blanche Lampert.)

A. Mr. Gilliland's home.

Q. And who else was present, if anybody?

A. My husband and myself and Mr. Gilliland.

Q. All right. What did Mr. Gilliland say?

A. He said he would not have anything to do with any women, play around with them or travel with them unless they come through the way he wanted them to. [240]

Q. Now, did you——

Mr. Hughes: Your Honor, I am going to move that that be stricken unless he establishes a substantial foundation as to who was present, the time, date and place.

The Court: You may cross examine on it or re-examine on it. The motion is denied.

Q. (By Mr. Murphey): Did you ever hear Mr. Frank Kerwin make any statement about selling Mrs. Gilliland any property——

Mr. Hughes: I object, your Honor.

Mr. Murphey: Impeachment.

The Court: Wait until the question is finished. Don't interrupt any more.

Mr. Hughes: Yes, sir.

The Court: Finish the question.

Q. (By Mr. Murphey): ——selling property to Mrs. Gilliland near Scottsdale in connection with Mr. Gilliland and Mr. Kerwin? A. Yes.

The Court: Just a moment. Did you have an objection?

Mr. Hughes: It is usually too late, your Honor, unless I stand up in the middle of a question.

(Testimony of Blanche Lampert.)

I move that it be stricken.

The Court: The motion is granted. [241]

Mr. Hughes: There has been no foundation laid.

The Court: The objection is sustained.

Q. (By Mr. Murphey): Did you ever hear a conversation between Mr. Gilliland and Mr. Kerwin on the subject matter of selling Mrs. Gilliland a hotel—excuse me—a restaurant. Just a minute.—a country club.

Mr. Hughes: I object, your Honor. There has been no foundation laid as to time, place,—

Mr. Murphey: I am merely asking as to the subject matter, yes or no.

The Court: What is the purpose of it?

Mr. Murphey: For the purpose of impeachment of Mr. Frank Kerwin, who testified he never did make an effort to sell her any property.

The Court: That's a collateral matter. Sustained.

Mr. Hughes: Thank you, your Honor.

Mr. Murphey: You may examine.

Redirect Examination

Q. (By Mr. Hughes): Mrs. Lampert, isn't it true that Mrs. Gilliland talked to you and told you her attorney would call you?

A. Mr. Murphey called me and said Mrs. Gilliland had told to call me. [242]

Q. Had you talked to Mrs. Gilliland before you talked to Mr. Murphey?

A. I had talked to her, but not on this subject. I had talked to Mrs. Gilliland; that is, just casually.

(Testimony of Blanche Lampert.)

Q. And you talked to her casually and she called her attorney and told her attorney to call you, that you had information, is that correct?

A. That's right.

Q. Mrs. Lampert, isn't it true that Mrs. Lyons was away from the premises—that you were away from the premises from May 15th to June 15, 1955?

A. That's right.

Q. And Mrs. Lyons was not there when you came back?

A. Mrs. Lyons came back after I came back. She was still there when I left.

Q. But a week later she came back, is that correct?

A. No. I——

Q. Wasn't it a week after you got back that she came back?

A. I don't know exactly, just exactly how long it was before she came back.

Q. How many times did you sit with Dan?

A. Three.

Q. From the time Mrs. Lyons was there from—well, until she left, you sat with Dan three times?

A. Three times.

Q. Wasn't one of those times immediately before Mrs. Lyons left, and you called her up and asked her to please come over and do something with Mr. Gilliland because he was intoxicated?

A. I don't remember whether it was one of those times or not.

Q. Wasn't that the time when the glasses were broke, and the rest, because he was intoxicated and

(Testimony of Blanche Lampert.)

you called her to come over and talked with him and take care of him?

A. Mr. Gilliland asked me to go up and sit that night. That is not true. Mr. Gilliland asked me to goup because he wanted to talk things over with her.

Q. And wasn't she cooking dinner when you went up there and she went down and you sat with the child for about 15 or 20 minutes and she came back and finished cooking dinner and finished feeding her child?

A. She did not. The boy went to bed before she came home.

Q. You spoke of these conversations. Isn't it true that Ray Gilliland never discussed the subject of sex with you?

A. He did with my husband.

Q. How did you know about it?

A. I overheard. It was in the kitchen where they were. [244]

Q. What was the date?

A. I don't know the exact date. It was when we were living there. I can tell you the month, but I can't tell you the exact date. I wasn't keeping track.

The Court: Give us the month and the year.

The Witness: It was between May 1st and May 15th and June 15th and September the 30th of the year 1955.

Q. (By Mr. Hughes): Was Faye Lyons in Scottsdale, Arizona, after July 7, 1955, to your knowledge?

(Testimony of Blanche Lampert.)

A. I don't know whether she was there at that date, or Mrs. Meyers.

The Court: You mean at any time after that date?

Mr. Hughes: Any time after that date, to your knowledge.

The Witness: I don't know. I don't know the exact date she left. I don't know.

The Court: The question was, was Mr. Lyons there at any time after July 7th? Is that it?

Mr. Hughes: July 7th, yes, sir.

The Court: 1955.

The Witness: I don't know.

The Court: Didn't you just tell us a few minutes ago that after you came back from your vacation in the middle of July—— [245]

The Witness: The 15th of June.

The Court: I am sorry. I misunderstood. Was it June?

The Witness: The 15th of June.

Mr. Hughes: I think the record will show that she stated July 15th.

The Court: If you stated July 15th did you mean June?

The Witness: I meant June.

Mr. Anson: My notes show that she stated June 15, 1955.

The Court: Well, the reporter's notes will show it.

The Witness: I meant June, if I said July, because that is when I took my vacation.

(Testimony of Blanche Lampert.)

The Court: Anything further?

Q. (By Mr. Hughes): Where is Mrs. Gilliland's house located?

The Court: With reference to what?

Q. (By Mr. Hughes): In Scottsdale, Arizona.

A. Sajuaro Road.

Q. And you work for Mrs. Winchell?

A. That's right.

Q. You are a housekeeper for Mrs. Winchell?

A. That's right.

Q. Are you her secretary? [246]

A. What do you mean, am I her secretary?

Q. Are you the secretary for Mrs. Winchell?

A. I do nearly all her buying and household things and pay a lot of her bills and write checks—if that is what you mean—and help take care of things like that. It that what you mean? If you mean does she dictate letters to me, the answer is no.

Q. Mrs. Lampert, where is Mr. Winchell's house in reference to Mr. Gilliland's house in Scottsdale?

A. Mrs. Winchell's house is on Yucca Road, and that is up—let's see, now. How are those directions? That is west or northwest of Mrs. Gilliland's house.

Q. Isn't Mrs. Winchell's house right directly behind Mrs. Gilliland's house in Scottsdale?

A. No.

Q. Isn't it true that you can stand in the front yard of the Winchell house and look directly into the back yard of the Gilliland house?

A. No. Mrs. Winchell's front yard faces the

(Testimony of Blanche Lampert.)

mountains. There is just one new house there. It doesn't face Mrs. Gilliland's house.

Q. If you stood on the back porch of Mrs. Winchell's house isn't it true you can look right into the back yard of Mrs. Gilliland's home?

A. You can see the garage. The garage belongs to the [247] house. You can't see into Mrs. Gilliland's house because that double garage and the two-room apartments are there. You can just see one end, a little bit of one end of her house.

Q. Isn't it true that Mr. Gilliland's house is located about four miles away from Mrs. Gilliland's house in Scottsdale?

A. No, it isn't that far from Mrs. Gilliland's house to Scottsdale.

Q. How far would you say it was away?

A. Oh, I wouldn't know just how far it is way. But it isn't that far, because it isn't that far into Scottsdale.

The Court: Would it be two miles?

The Witness: I would say maybe two, maybe two and a half. Not more than two, I wouldn't think.

The Court: Anything further?

Mr. Hughes: If your Honor please, we would like to move, in regard to Mr. Therrell's testimony for the admission——

The Court: Is there anything further of this witness?

Mr. Hughes: No, your Honor. Pardon me.

The Court: You may step down, Mrs. Lampert.

(Witness excused.) [248]

Mr. Hughes: We would like to move for the admission into evidence of the deposition of the Silvermans in refutation of this witness's testimony.

The Court: Any objection?

Mr. Murphey: No objection to the depositions.

The Court: Is that a single volume or——

Mr. Hughes: I think it is a single volume. That is in the Lyons case.

The Court: I assume it's stipulated that they are unavailable.

Mr. Murphey: I will stipulate that they reside in Phoenix, Arizona, and are not within the processes of the court, and not available.

The Court: Are they offered as a single volume?

Mr. Murphey: There are two volumes. One is Ray Silverman and the other one is Lenore Silverman.

The Court: The Ray Silverman deposition will be marked in evidence, Mr. Clerk, as Plaintiff Lyons' next exhibit in order.

The Clerk: Plaintiff Lyons' Exhibit 10, your Honor.

The Court: The other deposition—what is the name of it? What is the name of the other Silverman? Ray Silverman is Exhibit 10 in the Lyons case. [249]

The Clerk: Yes, your Honor.

The Court: All right. What is the name of the next Silverman?

The Clerk: Lenore.

The Court: Her deposition will be marked in evidence as Plaintiff Lyons' Exhibit 11.

(The exhibits referred to were marked Plaintiff's Exhibits 10 and 11 in Case No. 20301, and received in evidence.)

The Court: What next do you have?

Mr. Hughes: I would like to move for the admission of the Teich deposition in the Lyons matter.

The Court: Any objection?

Mr. Murphey: No objection, your Honor.

The Court: Is it stipulated that the witness is unavailable?

Mr. Murphey: That's right.

The Court: Received in evidence as Lyons' Exhibit 12. How do you spell the name of the last person?

Mr. Hughes: T-e-i-c-h, your Honor.

The Court: Do you have it, Mr. Clerk?

The Clerk: Yes, I do, sir.

The Court: File it in evidence.

(The exhibit referred to was marked Plaintiff's Exhibit 12 in Case No. 20301, and was received in evidence.) [250]

* * * * *

The Court: What is the next deposition?

Mr. Hughes: The next one is the deposition of Mary Elizabeth Bailey, medical records, librarian of the Visalia Municipal Hospital.

The Court: Any objection?

Mr. Murphey: I object as being incompetent, irrelevant and immaterial, no foundation laid.

The Court: Wherein is the foundation lacking?

Unavailability?

Mr. Hughes: Unavailability.

The Court: Wherein is the foundation specified to be lacking? [253]

Mr. Murphey: In that she is within the subpoena distance, as I understand it, of this court.

The Court: I will have to sustain the objection until there can be a showing of her unavailability.

Are you offering the Bailey deposition in the Meyer case?

Mr. Hughes: Both cases, your Honor.

The Clerk: I don't seem to have that one, either, your Honor.

The Court: Very well. You can't mark them unless you have them. If you find the Bailey deposition mark it in both cases for identification, only, as the next exhibit in order. And that, according to my notes, is Exhibit 13 in the Lyons case and Exhibit 15 in the Meyers case.

I suggest you check with the clerk if you think those depositions should be on file, and see what has happened to them.

You might check with Judge Hall's clerk, Mr. Clerk.

The Clerk: Yes, I shall.

The Court: Very well. Your next witness?

Mr. Anson: I call Mr. William L. Murphey, your Honor. [254]

* * * * *

ELSINORE MACHRIS GILLILAND

called as a witness in her own behalf, having been previously duly sworn, was examined and testified as follows:

The Clerk: Will you please state your name for the record?

The Witness: Elsinore Machris Gilliland.

The Clerk: And you have been heretofore sworn?

The Witness: Yes, I have been. Thank you.

Direct Examination

Mr. Murphey: May the clerk show the witness Exhibit 3 in the Lyons case?

(Whereupon, the exhibit was placed before the witness.)

Q. (By Mr. Murphey): Mrs. Gilliland, would you examine that document, page 4, lines 1 to 4, if you will, please?

The Court: Is that a copy of the cross-complaint?

Mr. Murphey: That's right, your Honor.

Just the first four lines, page 4.

The Witness: Yes, I have read them. [256]

The Court: Suppose you read them out loud to us so we know what you are talking about.

The Witness: You want me to read them out loud?

The Court: Yes.

The Witness: "On July 20, 1954, and days immediately subsequent thereto, while cross-complainant and cross-defendant were on their honeymoon at

(Testimony of Elsinore Machris Gilliland.)

Lake Tahoe, the cross-defendant associated with and kept Virginia Brown and Marilyn Lee.”

Any more?

Mr. Murphey: No. That's it.

Q. (By Mr. Murphey): Now, does that refresh your recollection as to any other information you had at the time that you filed this cross-complaint? Does that refresh your recollection?

A. I don't understand the question.

Q. What was the source of the information from which that allegation was made? Did anybody tell you anything about these two women?

A. Yes.

Q. Who was the party?

A. Mr. James Roach.

Q. And before you filed this complaint, did you have a conversation with Mr. Roach?

Mr. Hughes: I object, your Honor. I don't know [257] where Virginia Brown or Marilyn Lee enters into the issue in this matter.

Mr. Murphey: Just simply this, that the man's propensities——

The Court: Is this on the question of reasonable cause to believe?

Mr. Murphey: Yes, your Honor.

The Court: Very well. Overruled. You may answer.

The Witness: Did I have a conversation with Mr. Roach? Yes.

Q. (By Mr. Murphey): Where did this conversation take place?

(Testimony of Elsinore Machris Gilliland.)

A. At Lake Tahoe, at our home at Lake Tahoe.

Q. Who was present?

A. Mrs. Roach, James and myself.

Q. And what did Mr. Roach tell you?

A. He told me——

Mr. Hughes: I object, your Honor. There has been no time fixed that this conversation took place.

The Court: Fix the time and place.

Q. (By Mr. Murphey): Now, when with relation to the filing of your cross-complaint did you have this conversation with Mr. Roach as to what had happened at Lake Tahoe?

Mr. Murphey: Will you read it, please? [258]

The Witness: What was that?

Mr. Murphey: The reporter will read you the question.

The Court: Why don't you just ask her when it took place? Isn't that enough?

Mr. Murphey: All right.

Q. When did you have this conversation with Mr. Roach?

A. I had it almost immediately after this affair.

The Court: We don't know when it was.

The Witness: It was in July.

The Court: Of what year?

The Witness: 1954.

Q. (By Mr. Murphey): What did Mr. Roach tell you?

A. He told me that every morning on the way to the golf course that Mr. Gilliland would stop at this home where Miss Virginia Lee lived in, and Miss

(Testimony of Elsinore Machris Gilliland.)

Brown, and stop to see them. And he would go to their bedrooms and stay there for a while and come out.

Q. Did he make any statement at all as to any moneys being paid to these women?

A. Yes. He paid them a great deal of money.

Q. Now, do you recall an incident which happened on January 2, 1955——

A. Yes. [259]

Q. ——at Scottsdale?

A. It happened at Phoenix, Arizona, at the Westward Ho Hotel. Oh, I beg your pardon. The incident was the day after New Year's, I believe. Mr. Maxwell Dorn, yourself and myself drove out to Mr. Gilliland's home. I did not know where he lived. He got a hide-away, and I didn't know it. Mr. Dorn explained and showed us where Mr. Gilliland was living.

We got into the house. You and Mr. Dorn went in. You went to the door and he admitted you. He didn't know I was in the car. And I followed shortly afterward. And we had a conversation. There had been a woman there. There was a cigarette burning with lipstick on the cigarette and a coffee cup with lipstick around it. So we got into a small argument. I left the house. And you and Mr. Dorn saw this woman in the bedroom window, and you told me so. You said, "There is a woman in that bedroom." And I went back to that room——

Mr. Hughes: I object, your Honor, and move that it be stricken, unless it is confined to what she saw and heard.

(Testimony of Elsinore Machris Gilliland.)

The Court: Don't interrupt the witness. Wait until the witness completes her answer. If you wish to move to strike any portion of it, you may do so.

The Witness: So I returned to the house and I [260] said, "Ray, there is a woman in your room." I tried the doors. The doors were locked from the inside.

I said, "Ray, there's a woman in your room."

And he said, "So what of it?"

Q. (By Mr. Murphey): Is that all of that incident? A. No, that isn't all.

Q. I meant on the statement.

A. On the statement, no. There was — he had taken some articles from my home. They had disappeared from my house. Some of my wedding gifts, and I found them in the closet and I took them out — things that he had taken away from me. And I think that is all.

Mr. Murphey: All right. Any motion?

Mr. Hughes: Your Honor, I move to strike the entire testimony in response to the last question in that it is non responsive in that she relates a series of incidents that she heard from somebody, or somebody else told her; that there is not a particle that she said saw herself, except possibly about the wedding gifts that she found. It was either Mr. Dorn told her or Mr. Murphey told her, or somebody else told her.

The Court: Well, I assume that that is offered not to prove the truth of what was told her, but what was told her, the fact, the oral fact. [261]

(Testimony of Elsinore Machris Gilliland.)

Mr. Murphey: That is correct. And her frame of mind that has to do with the defense on the second count.

The Court: The motion is denied.

Q. (By Mr. Murphey): Now, following this did you have a conversation with me on the subject matter of filing this cross-complaint, or the cross-complaint which you have before you?

A. Yes.

Q. Where did this conversation take place?

A. At the Westward Ho Hotel in Phoenix.

Q. And would you tell the court the substance of that conversation?

Oh, just a minute. Was anybody else present?

A. I believe Milton Cohen and Patti Karger were present.

Q. I better identify the subject matter.

Mrs. Gilliland, did you have any conversation with me as to whether or not you should file a cross-complaint and any liability in connection with its filing?

Mr. Hughes: Your Honor, I am going to object because of the fact that this is counsel's own witness and he is leading her. And the question is, did we ever discuss filing a cross-complaint. What time, what place and what was discussed?

The Court: Overruled. You may answer. [262]

The Witness: I don't quite understand your question.

Q. (By Mr. Murphey): Did you have a conversation with me about whether or not you could or

(Testimony of Elsinore Machris Gilliland.)

should file a cross-complaint in this action for divorce? A. I believe so.

Q. Where did this conversation take place?

A. I think at the Westward Ho Hotel in Phoenix.

Q. Who was present?

A. Wasn't it Patti Karger and Cohen?

Q. All right. What was said?

A. Well——

Mr. Hughes: I object, your Honor. What was the date?

The Witness: What was said? Mr. Milton Cohen offered me a million dollars to make up with——

Mr. Hughes: Your Honor——

The Court: I instructed you not to interrupt the witness.

Mr. Hughes: Pardon me, your Honor.

The Court: You can cross examine on dates. She has told us about when it was.

Fix the date and we will have a great deal less trouble. Time, place and parties present. [263]

Mr. Murphey: All right.

Q. When did this take place with relation to the date that——

A. The 2nd of January, 1955.

Q. All right. Was there a discussion on that subject matter then, as to whether or not you should file this cross-complaint for divorce? A. Yes.

Q. All right. At the Westward Ho in the presence of Milton Cohen and Patti Karger.

The Court: What is your question?

(Testimony of Elsinore Machris Gilliland.)

Q. (By Mr. Murphey): Would you relate what the conversation was about filing this cross-complaint?

The Court: Do you remember the conversation?

The Witness: I don't remember it, no.

The Court: Perhaps you can suggest—that is a pretty broad topic, filing a cross-complaint.

Q. (By Mr. Murphey): Did I give you any advice as to whether or not there were sufficient facts to warrant you charging these women with adultery? A. Yes.

Q. Where did this conversation take place, if you recall? [264] A. I don't recall.

Q. Do you know about when it was?

A. It was January 1955.

Q. Was that before the action was filed in September 1955? Just to refresh your memory, the original complaint by Mr. Gilliland was filed in September 1955, Mrs. Gilliland——

Mr. Anson: October 21st.

Mr. Murphey: October 21st.

The Court: January 1955 or January 1956? When was the cross-complaint filed?

Mr. Anson: November 29, 1955.

Mr. Murphey: November 29, 1955.

The Witness: I can't remember dates.

Q. (By Mr. Murphey): Was it just before the cross-complaint was filed?

A. I don't remember.

Q. Now, Mrs. Gilliland, at the time you verified this cross-complaint—you have it before you if you

(Testimony of Elsinore Machris Gilliland.)

care to examine it. You check it, the last sheet. I think you will find you swore to it before Mr. Anson on a certain date.

The Court: Is that Exhibit 3? Do you find your signature on it?

The Witness: I signed it.

The Court: Do you remember when you signed it?

The Witness: 30th day of November, 1955. [265]

The Court: Do you remember the occasion when you signed it?

The Witness: I don't remember. I see my signature, but I do not remember the date, your Honor.

The Court: I didn't ask you the date. I asked you if you remembered the occasion.

The Witness: There have been so many occasions.

The Court: Proceed.

Q. (By Mr. Murphey): Well, the time that you verified this cross-complaint, Mrs. Gilliland, did you bear Ann Meyers or Faye Lyons any ill will?

A. No, I did not.

Q. Did you have any feeling of spite against either of them? A. No.

Q. Did you in your mind bear any vindictive enmity towards either of them? A. No.

Q. In filing this cross-complaint were you actuated by any wish or desire or design or purpose to injure Ann Meyers or Faye Lyons? A. No.

Q. Did you honestly believe the truth of the allegations of that cross-complaint? [266]

(Testimony of Elsinore Machris Gilliland.)

A. Yes.

Mr. Murphey: One other thing.

Q. Do you recall that I showed you a registration certificate of "Ray Gilliland and Family" at the Colonial House at Las Vegas? A. Yes.

Mr. Murphey: Will you please mark this for identification?

Would you show those to the witness? Please have them identified first, Mr. Clerk.

The Court: Have they been marked?

Mr. Murphey: Yes, marked for identification.

The Clerk: Defendant's Exhibit E, your Honor, in both cases.

The Court: Very well.

(The document referred to was marked Defendant's Exhibit E for identification in the Faye Lyons and Ann Meyers cases respectively.)

Q. (By Mr. Murphey): Mrs. Gilliland, before you signed this cross-complaint, verified it, had you seen those registrations and the bill which are now before you? A. I believe I did.

Q. Did I show them to you?

A. No. I don't know whether you did or not. I found [267] them in Mr. Gilliland's suitcase.

Q. You did? A. Yes, sir.

Q. Well, that might have been the receipt——

A. The receipt.

Q. ——but the registration that is there.

A. Oh. The receipts I found in his case. Also a

(Testimony of Elsinore Machris Gilliland.)

receipt for the car that he had bought for Miss Faye Lyons. I mean the first payment.

Q. Isn't it the fact that I showed you that registration card there, the one bearing "Ray Gilliland and Family"? A. I believe so.

Q. You had that information at the time that you verified this complaint, did you not?

A. Yes, sir. [268]

* * * * *

Q. (By Mr. Murphey): Other than the filing of this cross-complaint in that action down there did you make any statement anywhere that Ray committed adultery with either of these women?

A. No, I did not.

Q. Did you cause any publication to be made of any article, in substance or effect, that Ray committed adultery with either of these women?

A. No.

Q. Did you ever have an interview with any reporters of the Riverside Enterprise in which you asked that the case be published?

A. No, I did not.

Mr. Murphey: Thank you, your Honor. No further questions.

The Court: We will take a recess at this time until tomorrow morning at 10:00 o'clock. You will be excused until that time.

(Witness temporarily excused.) [270]

The Court: Gentlemen, before we adjourn, on this question of admissibility of the deceased Ray Gilliland, the statement allegedly made as to his

condition to the nurse by the witness Ida Barr, you may wish to examine the cases over the recess which are collected at 64 ALA at 557.

Especially you may wish to examine the case of Kennedy against Rochester, 130 N. Y. 654, 29 N. E. 141. And another New York case Tromblee against North American Accident Insurance Company, 173 Appellate Division 174, 158 N. Y. Supp. 1014, affirmed without opinion 226 N. Y. 615.

In that latter case I understand a declaration was admitted where the declarant was dead.

These cases usually arise where there is an attempt to get into evidence a hearsay declaration of subjective conditions such as pain where a man says, "Oh, my arm hurts," or "My back hurts," or something like that.

This problem here is a different situation, of course. Of course, it's a declaration of a subjective condition which carries the elements of trustworthiness because of the very nature of it, that a man wouldn't likely make it unless it was so. Added to that is the circumstance that the declarant is now dead. Opposed to that is the vicious circumstance that it is made in connection with [271] this lawsuit and subject to that fabrication. It's of a self-serving character with respect to this lawsuit; not from the point of view of the declarant, but from the point of view of the circumstances under which it was made.

It poses a very interesting question as to the admissibility of it, and I would be glad to have you research those matters.

Mr. Anson: Could I remind your Honor that we filed our points and authorities, and on page 6 we relied on *Evans v. Evans*, and *Wilson v. Wilson*. And I think it might clarify our position in this matter if we did not offer those declarations as truth of the contents, but rather to show the state of mind of the declarant at that time as part of the circumstances under which the suspicious circumstances should be judged. And this is to show not the truth——

The Court: You aren't offering it. The plaintiff is offering the evidence that I am referring to. The plaintiff is offering the evidence as to Ray Gilliland's statement to the nurse of his subjective condition. That is what I am referring to.

Mr. Anson: I am sorry. Those were offered as proof and——

The Court: Well, yes. They are in the same category. I take it, as offering the statement of a dead man normally made to his physician as to what his subjective [272] symptoms were.

Mr. Anson: We feel that since they are offered to prove their truth they are hearsay.

The Court: Here they were made to a layman, in effect, and I have mentioned the considerations that I am thinking about. And I would like to have you do some research on it.

Did you get those citations?

Mr. Hughes: Yes, your Honor.

The Court: There is some discussion of the general question in the American Law Institute, "Basic

problems of evidence, Volume II" by Edmond M. Morgan, pages 285, and so forth.

We will take the recess now until tomorrow morning at 10:00 o'clock.

The court will adjourn.

(Whereupon, an adjournment was taken until 10:00 o'clock a.m., of the following day, Thursday, June 5, 1958.) [273]

* * * * *

Mr. Murphey: In regard to that medical deposition, your Honor, could I make a motion on that at this time?

The Court: Which deposition?

Mr. Murphey: Mary Elizabeth Bailey, medical librarian of the Visalia Municipal Hospital.

The Court: Yes.

Mr. Murphey: Your Honor, for the information of counsel, I have copies of the depositions of J. R. Edwards and Allen Moffatt, which I believe were missing yesterday.

The Court: Did you find the originals, Mr. Clerk?

The Clerk: No. I will continue my search, however. I haven't yet located them.

The Court: Well, they may never have been filed. Who had the originals?

The Clerk: Our docket shows that they have been filed. [277]

The Court: They have been filed?

The Clerk: Yes.

The Court: Well, is there any objection to re-

ceiving the copies in lieu of the originals pending the clerk's finding of the originals?

Mr. Hughes: No objection, your Honor. But the same situation exists, your Honor, in the case of the medical records of the Visalia Municipal Hospital. And I have a letter, a copy of the letter of transmittal from the reporter.

The Court: There was an objection to that Bailey deposition, was there not?

Mr. Hughes: Yes, your Honor.

The Court: There was no foundation laid for the use of it.

Mr. Hughes: No, your Honor. The objection was based on the fact that the witness was available from within this district. That was the objection.

The Court: Yes. That's the foundation objection.

Mr. Hughes: Our motion is based on Rule 26(3) in that notice was duly given to counsel for the defendant; that no objection was made to the notice for the taking of the deposition; that the defendant's counsel ordered a copy from the reporter of the deposition; that the records consist only of the medical records and hospital records of the Visalia Municipal Hospital for December 1950 and [278] January 1951 as to Ray C. Gilliland's orchiectomy and that they were kept in the regular course of the hospital's business in the operation of the same; that these records are over five years old; that they are reliable and that they are relevant.

The Court: The point now is, is there any showing that the witness shouldn't have been produced.

That is the question, isn't it? We reach the other questions when we see the deposition.

Mr. Hughes: Yes, your Honor. Rule 26(3) provides that if the witness is without a hundred miles from the place where the court is sitting that a deposition may be taken of the witness and submitted into evidence. The witness in this instance is located in Visalia, California, over 187 miles from this courtroom. It would be a manifest injustice to exclude the submission of this deposition in that the defendant has had an opportunity to cross examine, if he so desired. The defendant has had an opportunity to object to the taking of the deposition if he so desired. And none of these objections have been taken at any time through the proceedings. And pursuant to Rule 26(3), Section (D) of that rule, states the deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds that the witness is at a greater distance than 100 miles from the place of trial or hearing, [279] "or" — and that's "or" before each one of them in the disjunctive.

The Court: Are you asking for it to be admitted under subdivision 5 of subdivision (3) of Rule 26?

Mr. Hughes: Yes, your Honor. Subdivision 5——

The Court: Rule 26(d)(3) 5, is that it?

Mr. Hughes: Yes, sir. And also 2, not in parentheses.

The Court: Where is the witness?

Mr. Hughes: Visalia, California.

The Court: How far is Visalia?

Mr. Hughes: 187 miles.

Mr. Murphey: I will stipulate that the witness resides at Visalia and that it is more than a hundred miles from the courtroom.

The Court: Very well. Is there any further objection to the receipt of the deposition?

Mr. Murphey: Other than it's incompetent, irrelevant and immaterial to any issue in this case, the fact that he may have had this operation.

The Court: Overruled. The deposition will be received in evidence. It's Exhibit No. 15 in the Meyers case, I believe, Mr. Clerk, and Exhibit 13 in the Lyons case.

The Clerk: That is correct, your Honor. [280]

(The exhibit referred to, marked Plaintiff's Exhibit 13 in Case No. 20301 and Exhibit No. 15 in Case No. 20302, was received in evidence.)

* * * * *

FAY LYONS

called as a witness by the plaintiff, having been previously sworn, resumed the stand and testified in rebuttal as follows:

Mr. Murphey: The defendant would offer that in evidence, if the court please. Information which Mrs. [298] Gilliland had at the time she filed her cross complaint.

The Court: Offered for that limited purpose?

Mr. Murphey: That is correct.

The Court: Any objection?

Mr. Hughes: For the fact that she had that, your Honor, at the time she filed her complaint,

(Testimony of Fay Lyons.)

I object that it is immaterial on that basis; that it shows nothing other than Ray Gilliland was in the Colonial House Hotel in Las Vegas, Nevada, and three people were registered there as "Ray Gilliland and family." There is nothing to tie it into this case.

The Court: You are referring to weight rather than its admissibility.

Exhibit E for identification is received in evidence.

(The exhibit referred to, marked Defendant's Exhibit E, was received in evidence.)

The Court: Does the defendant now rest?

Mr. Murphey: Yes, your Honor.

The Court: Very well. This is rebuttal.

Direct Examination

Q. (By Mr. Hughes): Have you ever been in Las Vegas, Nevada?

A. I have never been in Las Vegas, Nevada in my life.

Q. Miss Lyons, you testified that when you went home [299] to Miami in May of 1955 you went home because you had a sick father.

A. Yes. May I explain now?

Q. Yes, ma'am.

Mr. Anson: I am going to object to that as not going to rebut anything we have offered.

The Court: What is the purpose of the question? How can it serve to rebut anything the defense has offered? The defense hasn't questioned that, has it?

(Testimony of Fay Lyons.)

Mr. Hughes: I can't think of any way it does, your Honor.

The Court: Sustained.

I understand the defendant's theory is not that her father wasn't ill, but how she went back and whom she went with. The defense takes issue on that.

Q. (By Mr. Hughes): Why did you go in the manner you did, Miss Lyons?

Mr. Anson: That has been asked and answered.

The Witness: I didn't say——

The Court: About the airline reservations.

The Witness: My father died June 13th. I haven't said that yet. This doesn't have continuity unless I explain the reason and truth of the matter of the strike. It follows up, you see. I got back June 4th——

Mr. Hughes: If you please. [300]

The Witness: And he died June 13th. And then I couldn't——

Mr. Hughes: That is all.

Mr. Murphy: No questions.

The Court: Anything further?

Mr. Hughes: No, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: Any further rebuttal?

Mr. Hughes: None, your Honor.

The Court: You both rest?

Mr. Murphey: We rest, your Honor.

Mr. Hughes: Yes, your Honor. [301]

* * * * *

Mr. Hughes: The unsuccessful plea of truth is also an element of damage. If the court finds that they have plead truth as a defense to these causes of action, and they are unsuccessful [353] in their proof in regard to truth, the fact that they plead it is an element of damage.

The Court: That is only involved in the first cause of action, isn't it?

Mr. Hughes: Yes, your Honor.

Also, an element of damage is the loss of future reputation. There has been placed before the court the fact that both of these women have children; one of them with an eight or nine year child, and another one with three children, and both of them wish to look in the eyes of those children as respectable and decent people and not be besmirched or stained by somebody else's private fight.

Another element of this damage is emotional distress and bodily harm. And I am certain the court recalls the testimony of the emotional distress of Mrs. Meyer and the emotional distress of Mrs. Lyons.

The Court: What do you say to any consideration, if we reach that question, being given to the fact as to the second cause of action that plaintiffs may have brought some of the damage on themselves?

Mr. Hughes: In the second cause of action?

The Court: Yes. By giving the appearance that certain things were so, even though they were not?

Mr. Hughes: Well, your Honor, on that basis I call your attention to when a publication is not

privileged, [354] if the publisher had no probable cause for believing the truth of his statement or did not investigate the truth of the statement, he is liable.

The Court: Well, if a wife saw her husband traveling around with another woman, staying all night in hotels with him; if she made a technical error should she be penalized the same as if she made a substantial error?

In other words, what I am getting at is this: Assuming the same damage to reputation, would you seek this same award in a situation where the woman wasn't even at the hotel. And another case where the woman says, "Yes, I was in the adjoining room with him, but nothing happened. Why? Because nothing could happen."

Would you award the same damages?

Mr. Hughes: The same amount?

The Court: Yes. They are both equally damaged in their reputation.

Mr. Hughes: I don't think I would, your Honor.

The Court: Well, that is what I am getting at. How much consideration should be given to the fact where a woman knowingly runs around with a married man who is having divorce troubles with his wife, how much of that damage should be said to be brought upon herself.

Mr. Hughes: I am afraid quite a bit, your Honor. [355]

The Court: It's a little bit like contributory negligence, isn't it?

Mr. Hughes: Well, is contributory negligence a defense?

The Court: No. I didn't mean the precise analogy. I meant like a person hurting himself. A woman who knows that a man is married, knows that litigation is going on between them, shouldn't it be said that she brought some of the damage on herself?

Mr. Hughes: I would say the measure of damage, the value of same, would be greatly reduced.

* * * * *

[Endorsed]: Filed February 26, 1959.

[Endorsed]: No. 16385. United States Court of Appeals for the Ninth Circuit. Elsinore C. Machris Gilliland, also known as Elsinore Machris Gilliland, Appellant, vs. Faye Lyons, Appellee. Transcript of Record. Appeal from the United States District Court for the Southern District of California, Central Division.

Filed and Docketed: February 28, 1959.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals
For the Ninth Circuit

No. 16385

ELSINORE C. MACHRIS GILLILAND, also
known as ELSINORE MACHRIS GILLI-
LAND, Appellant,

vs.

FAYE LYONS, Respondent.

DESIGNATION OF POINTS ON APPEAL

Appellant hereby designates the following points
to be urged on appeal:

1. The District Court had no jurisdiction under Rule 59(d) of the Rules of Civil Procedure to grant the motion for new trial on the ground stated, namely: that evidence of truth of libelous matter was received, when truth was not pleaded as an affirmative defense.

2. Assuming that the District Court had jurisdiction, the granting of the motion on the ground stated was a gross and prejudicial abuse of discretion.

A. The plaintiff presented evidence on the issue of truth.

B. On cross examination of plaintiff's witnesses, defendant presented evidence on truth without objection by plaintiff.

C. The evidence was admissible on the first and

third causes of action, where truth was pleaded as an affirmative defense.

D. The receipt and consideration of the evidence was harmless as the District Court was not required as a matter of law to find, and did not find, on the issue of truth.

3. If the District Court granted the motion on the ground of insufficiency of evidence to support the finding of privilege (Finding VII), the decision was a gross abuse of discretion as there was ample evidence to support the said finding as a matter of law.

Dated: Feb. 27, 1959.

Respectfully submitted,

WM. L. MURPHEY and
JOHN B. ANSON,

/s/ By WM. L. MURPHEY,
Of Counsel for Appellant.

[Endorsed]: Filed February 28, 1959. Paul P. O'Brien, Clerk.

[Title of Court of Appeals and Cause.]

APPELLANT'S DESIGNATION OF RECORD TO BE PRINTED

Appellant hereby designates the following portion of the record, which appellant considers material to consideration of the appeal, and requests that the same be printed, to wit:

A. Complaint—filed 8-9-56

Amended Complaint—filed 11-20-56

Notice of Motion to Strike from Amended Complaint, with Memorandum of Points and Authorities in support thereof

Minute Order dated 12-10-56

Answer to Amended Complaint—filed 12-28-56

Pre-Trial Conference Order [Plaintiff's Exhibit 2]

Findings of Fact, Conclusions of Law and Judgment

Motion for New Trial

Defendant's Memorandum in Opposition to Plaintiff's Motion for New Trial

Plaintiff's Reply Memorandum

Order on Plaintiff's Motion for New Trial

Notice of Appeal

Designation by Appellant of Record on Appeal.

B. Plaintiff's Exhibits 1 to 13, inclusive

Defendant's Exhibits A to E, inclusive.

C. The following portions of the reporter's official transcript of proceedings on June 3, 4 and 5, 1958, to wit:

Page 4, line 12 through Page 5, line 15, inc.

Page 7, line 5 through Page 46, line 5, inc.

Page 46, line 15 through Page 69, line 24, inc.

Page 72, line 5 through Page 83, line 20, inc.

Page 119, line 10 through Page 125, line 12, inc.

Page 125, line 17 through Page 128, line 17, inc.

Page 133, line 1 through Page 149, line 20, inc.

Page 150, line 13 through Page 157, line 15, inc.

Page 158, line 3 through Page 198, line 19, inc.

Page 198, line 21 through Page 199, line 8, inc.

Page 229, line 4 through Page 248, line 24, inc.

Page 249, line 1 through Page 250, line 9, inc.
Page 250, line 10 through line 25, inc.
Page 253, line 14 through Page 254, line 22, inc.
Page 256, line 5 through Page 268, line 16, inc.
Page 270, line 8 through line 25, inc.
Page 271, line 1 through Page 273, line 19, inc.
Page 277, line 11 through Page 281, line 3, inc.
Page 298, line 21 through Page 301, line 14, inc.
Page 353, line 23 through Page 356, line 11, inc.

Dated: March 4, 1959.

Respectfully submitted,

WM. L. MURPHEY and
JOHN B. ANSON,
/s/ By WM. L. MURPHEY,
Of Counsel for Appellant.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed March 6, 1959. Paul P.
O'Brien, Clerk.